Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

ADELE BUZZETTI d/b/a COZY CABIN and VANESSA DOE, the first and last names being fictitious,

Petitioners,

vs.

THE CITY OF NEW YORK; THE DEPARTMENT OF CITY PLANNING; THE DEPARTMENT OF BUILDINGS; THE NEW YORK CITY COUNCIL; RUDOLPH W. GIULIANI, JOSEPH ROSE AND GASTON SILVA, in their official capacities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the New York City adult-business zoning ordinance discriminates against women in violation of the Fourtheenth Amendment because it imposes onerous land-use restrictions on clubs featuring barechested female performers but not on clubs featuring barechested male performers.

2. Whether the New York City adult-business zoning ordinance violates the First and Fourteenth Amendments because it selectively burdens erotic expression based upon the sex of the speaker.

INTERESTED PARTIES

All parties to this appeal are identified in the caption on the cover of this brief. Because no corporations are involved in this matter, there are no parent companies and no subsidiaries to be listed.

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Petitioners Adele Buzzetti and Vanessa Doe respectfully request that a writ of *certiorari* issue to review the judgment and opinion entered in this case on March 20, 1998, by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at __ F.3d __, (2d Cir. 1998). That opinion is set forth in the Appendix to this Petition at A, 1a-22a. The opinion of the United States District Court for the Southern District of New York is reported at 1997 WL 164284 (S.D.N.Y. April 8, 1997). That opinion is set forth in the Appendix to this Petition at B, 23a-37a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 20, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution, as well as the applicable provisions of the New York City Zoning Resolutions are set forth in the Appendix to this Petition at C, 38a-40a.

STATEMENT OF THE CASE

There is a substantial demand in New York City for barechested erotic dancers. No one disputes that this market includes both male and female performers. These dancers are similarly situated in every relevant respect. Through choreographed expression, they display their bodies for the erotic fascination of their audiences, for compensation.

New York City has nevertheless enacted a zoning ordinance to regulate topless clubs that draws an invidious gender distinction. It subjects only those clubs that feature female performers to onerous land-use restrictions that will force many of them to relocate or close. On the other hand, the ordinance leaves male erotic entertainers free to perform barechested in clubs located throughout New York City, without jeopardizing the stages upon which they dance. The blanket justification that the city throws over this naked bias is its alleged goal of curbing the so-called "secondary effects" on the community that have been associated with adult entertainment businesses. The city has no evidence, however, that topless clubs featuring female performers are more likely to generate secondary effects than clubs that spotlight men.

At its more abstract level, this case — about a small bar in Queens and a woman who works there — is at the crossroads of *eros* and equality. At its more immediate and material level, it is about job opportunities and restrictive sex stereotypes. At both levels, New York City's zoning ordinance, and the decisions of the courts below, are indefensible. Simply put, if a municipality is going to burden the communication of messages involving human sexuality based upon the messenger's gender, it had better demonstrate a convincing basis for doing so. The Constitution requires no less.

On October 11, 1996, in the United States District Court for the Southern District of New York, petitioners commenced this

action challenging Section 12-10 of Text Amendment N950384ZRY to the Zoning Resolutions of the City of New York ("section 12-10"). New York City's zoning ordinance subjects "adult eating and drinking establishment[s]" to numerous land-use restrictions, 7a, and section 12-10 defines such places to include clubs that "regularly feature[ ] . . . live performances which are characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities.' " 39a. Section 12-10 further defines "specified anatomical areas" to include the "female breast below a point immediately above the top of the areola." 4a. It similarly defines "specified sexual activities" to include "fondling or other erotic touching of . . . [the] female breast." *Id.* Petitioners claimed that the statute's exemption of male topless clubs from onerous land-use restrictions violates the Equal Protection Clause of the Fourteenth Amendment by placing a disparate burden on clubs featuring female performers. Petitioners also claimed that section 12-10 violates the First and Fourteenth Amendments by discriminating against protected expression on the basis of viewpoint. 24a.

Applying the "secondary effects" analysis adopted by this Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the district court rejected both claims. Specifically, the district court decided that "[t]here is nothing to suggest" that the secondary effects of female topless clubs "are not substantially different" from clubs featuring male barechested performers, and therefore section 12-10's gender distinction is justified. 32a. The district court also concluded that "there are anatomical differences between males and females which in our society elicit different reactions," and thus section 12-10's gender based classification does not reflect any gender bias. 34a.

The court of appeals affirmed. Despite New York City's unavoidable concession that none of its secondary effects studies actually studied the relative community impact of male topless

clubs,[1] the Second Circuit held that "New York City's objectives of preventing crime, maintaining property values, and preserving the quality of urban life are important," and that "the Zoning Amendment's regulation of female, but not male, topless dancing, . . . is substantially related to the achievement of New York City's objectives." 18a. The court of appeals therefore rejected petitioners' equal protection claim.

The Second Circuit was equally indifferent to petitioners' First Amendment claim. After summarizing the general principles set forth in *Renton*, 11a, the panel rejected petitioners' specific argument that the zoning ordinance gives rise to viewpoint discrimination because section 12-10 selectively burdens erotic expression based upon the dancers' sex. According to the court of appeals, because New York City did not specifically intend to suppress a female erotic perspective, section 12-10 is not unlawfully viewpoint biased. 13a.

These rulings contradict numerous decisions of this Court, as well as those of other Circuits. Relying on sex stereotypes and purported social conventions, the courts below have endorsed a gender classification that unfairly restricts the opportunities of women in a profession that is otherwise open to both sexes. Moreover, by casting legislative intent as a threshold requirement for claims of viewpoint discrimination, the Second Circuit has seriously blurred the critical line between the acceptable time, place and manner restriction approved by *Renton*, and what is, at best, New York City's *de facto* suppression of specific messages. Accordingly, petitioners' seek a writ of *certiorari* to review the court of appeals' decision.

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1. *See* Second Circuit Brief of Appellees City of New York, *et al.*, at 42.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S EQUAL PROTECTION RULING CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT.

Just two terms ago, this Court forcefully restated the constitutional mandate that governs this case.

> [N]either federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature — equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.

United States v. Virginia, 116 S. Ct. 2264, 2275 (1996). The Court further underscored that

> "[i]nherent differences" between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.

Id. at 2276. The decision below sterilizes these precepts.

At stake here is petitioner Vanessa Doe's "equal opportunity" to gain employment as a topless dancer, based upon her "individual talents and capacities." Section 12-10 severely limits that opportunity by placing onerous land-use restrictions on clubs like petitioner Adele Buzzetti's Cozy Cabin, which will be forced to close by the city. Because the dancers' sex is the statutory

trigger for these zoning restrictions, section 12-10 unquestionably discriminates on the basis of gender. *See Reed v. Reed*, 404 U.S. 71, 75 (1971); *Williams v. City of Fort Worth*, 782 S.W. 2d 290, 297 (Tex. App. 1989) (invalidating as invidious gender discrimination municipal regulation that prohibited "[c]lubs regularly featuring topless female dancers . . . within the zoned 1000 feet limits, while [permitting] clubs regularly featuring male topless dancers . . . within these limits").

In failing to enforce petitioners' equal protection rights, the Second Circuit's principal error was to place

> too much emphasis on the desirability of achieving the [City's] asserted statutory goal — prevention of [secondary effects] — and not enough emphasis on the fundamental question of whether the sex-based discrimination in [section 12-10] is *substantially* related to the achievement of that goal.

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 488-89 (1981) (Brennan, J., dissenting); *see also Caban v. Mohammed*, 441 U.S. 380, 391 (1979); *Craig v. Boren*, 429 U.S. 190, 199-200 (1976). Even where "the State's objective is legitimate and important, [courts must] determine whether the requisite direct, substantial relationship between objective and means is present." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). This nexus must be "exceedingly persuasive," and the burden of proof "rests entirely on the State." *Virginia*, 116 S. Ct. at 2275 (internal quotation marks omitted). In this case, New York City completely failed to meet this "demanding" requirement. *Id.*

As the city has conceded, *see supra* at 4 n.1, none of the secondary effects studies upon which it relied to enact section 12-10 considered the secondary effects of male topless dance

clubs in relation to clubs that feature female dancers. (A44-241).[2] Consequently, under this Court's controlling decision in *Craig v. Boren*, 429 U.S. 190 (1976), the city cannot possibly justify the statute's discrimination.

In *Craig*, this Court invalidated an Oklahoma statute that established different legal drinking ages on the basis of sex. *See id.* at 204. The state argued that the law's underlying objective was "the enhancement of traffic safety," *id.* at 199, and had proffered statistical evidence regarding alcohol-related traffic violations among teenagers to justify the statute's gender classification, *id.* at 200-01. The Court struck the law, however, because Oklahoma's showing could not "support the conclusion that the gender based distinction closely serves to achieve [the traffic-safety] objective," *id.* at 200. Specifically, the Court rejected Oklahoma's purported justification for the challenged classification because

> many of the studies, while graphically documenting the unfortunate increase in driving while under the influence of alcohol, make no effort to relate their findings to age-sex differentials as involved here.

Id. at 203 (footnote omitted). Because New York City's secondary effects studies likewise "make no effort to relate their findings" to the challenged sex-based classification, the city's stated objective of minimizing the alleged negative impacts of adult entertainment establishments is also inadequate to justify section 12-10's disparate treatment of topless bars.[3] The Second Circuit simply disregarded *Craig*.

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2. Citations to "A" refer to page designations in the parties' joint appendix that was filed in the court of appeals.

3. Trying to cure this critical defect in proof, the city submitted an affidavit from Joseph B. Rose, Chairman of the New York City Planning Commission, to (Cont'd)

The court of appeals' second error has even more far-reaching and invidious implications. By invoking the purported "conventions of our society" — according to which the "public exposure of the female breast . . . almost invariably conveys sexual overtones" while "the male chest is routinely exposed . . . without involving any sexual suggestion" — the panel concluded that it was

> permissible for New York City, in its effort to achieve the objectives of the Zoning Ordinance, to classify female toplessness differently from the exhibition of the naked male chest.

20a. Unfortunately, this rationale erroneously accepts "as a defense to [section 12-10's] gender-based [classification] the very stereotype that the law condemns." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138 (1994) (internal quotation marks omitted). Indeed, it is precisely these types of "archaic and overbroad generalizations" that have repeatedly collapsed under the weight of the Equal Protection Clause. *Craig*, 429 U.S. at 198 (internal quotation marks omitted); *see e.g.*, *Caban*, 441 U.S. at 389; *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).[4]

(Cont'd)
the district court. (A287-311). After going on at length about the structure of the city's adult-business zoning regulations, and the general studies concerning secondary effects, Mr. Rose summarily stated that the city "has no evidence" that male topless clubs "create the type of negative community impacts that the adult establishments covered by [section 12-10] tend to produce." (A 311). Apart from simply recasting in less egregious terms the city's failure to inquire into the possible secondary effects of male topless clubs, Mr. Rose's explanation was "invented *post hoc* in response to litigation." *Virginia*, 116 S. Ct. at 2275. Consequently, the court of appeals' reliance upon the Rose affidavit to justify section 12-10's gender discrimination, 18a-19a, was clearly improper. *Virginia*, 116 S. Ct. at 2275.

4. Furthermore, in applying these social conventions, the court of appeals (Cont'd)

This Court has unambiguously instructed that

> the test for determining the validity of a gender based classification is straightforward, [and] must be applied free of fixed notions concerning the roles and abilities of males and females.

Mississippi Univ. for Women, 458 U.S. at 725. The courts below violated this rule. Because this case involves regulation of adult entertainment establishments, the Second Circuit's judgment necessarily (and ironically) "perpetuate[s] the stereotyped view" that only women are (or should be) sex objects. *Id.*, at 729; *cf. Aids Action Comm. v. MBTA*, 42 F.3d 1, 12 (1st Cir. 1994) (describing "overtly sexual" film advertisements as "represent[ing] the *conventional* exploitation of women's bodies for commercial advertising"). Any such suggestion, however, plainly conflicts with petitioners' unrebutted expert evidence that discusses the recent

> socioeconomic trends [that] offer significant opportunities for employment and remuneration for attractive men who display their chest area during posing and dancing for audiences of both genders.

(Cont'd)
ignored the *legal* conventions that should have informed its decision. The court's debatable assumption that the "public exposure of the female breast . . . almost invariably conveys sexual overtones" 20a is insufficient under New York law to prohibit women from walking about barechested in public parks. *See People v. Santorelli*, 80 N.Y. 2d 875, 877, 587 N.Y.S. 2d 601, 602-03 (1992). And whatever role these social conventions may properly play "in protecting the moral sensibilities" of those who "do not want to be exposed willy-nilly to public displays of various portions of their fellow citizens anatomies," *United States v. Biocic*, 928 F.2d 112, 115 (4th Cir. 1991) (upholding indecency law that prohibited women from appearing barechested in public), they certainly have no rational application to private fora (such as topless bars) that are specifically dedicated to voluntary, adult audiences seeking erotic entertainment.

(A243). It also ignores the several clubs in New York City that specifically feature barechested, erotic male dancers. (A279-281).[5]

Clearly, the sociological premise for the Second Circuit's holding is "more consistent with the role-typing society has long imposed, than with contemporary reality." *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) (plurality) (internal quotation marks and citations omitted). Indeed, the crux of its decision "is surely based on generalizations (stereotypes) about the way that women (or men) are." *Miller v. Albright*, 118 S. Ct. 1428, ___, 1998 WL 186812 at *25 (U.S. April 22, 1998) (Ginsburg, J., dissenting). For example, the panel's assumption that female topless clubs are likely to generate more crime and neighborhood decay than male clubs presupposes certain sex-based, behavioral proclivities — *i.e.*, that female dancers, and audiences comprised primarily of heterosexual men or lesbians, are more prone to engage in vice than their counterparts.

"Once those traditional notions [are] abandoned, [however,] no basis for finding a substantial relationship between [section 12-10's] classification and objective remain[s]." *Mississippi Univ. for Women*, 458 U.S. at 726 n.11.

Finally, the decision of the court of appeals adds to the ongoing confusion as to the proper role of biology in assessing claims of gender discrimination. Misconstruing this Court's plurality opinion in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), the Second Circuit reached the overbroad conclusion that

> [s]tatutes that fairly can be seen as responding to clear sexual differences between men and women are among

5. Neither the district court nor the court of appeals acknowledged any of the representative male topless clubs in the record except for Chippendales. 31a-32a; 18a.

> those laws that courts have upheld, despite the gender-based classifications contained within them.

17a.

This interpretation mistakes social psychology for sexual physiology. Rather than openly addressing the diversity of sexual roleplay revealed by petitioners' equal protection claim, the panel used secondary sex characteristics to justify section 12-10's gender inequity. *Michael M.* does not condone this result. It merely recognizes that, under the Equal Protection Clause, "physiological differences between men and women [need not] be disregarded." 450 U.S. at 481 (Stewart, J., concurring). Because this case does not involve a legal classification based upon biological processes, *Michael M.* is inapposite.

Justice Stevens' dissent in *Michael M.*, however, suggests a sensible principle to guide the resolution of disputes, like this one, that focus on superficial anatomical differences between the sexes:

> In cases involving discrimination between men and women, the natural differences between the sexes are sometimes relevant, and sometimes wholly irrelevant. If those differences are obviously irrelevant, the discrimination should be presumptively unlawful in the same way that racial classifications are presumptively unlawful.

Id. at 498 (Stevens, J., dissenting). This Court has recently moved closer towards adopting such a rule, observing that

> "[i]nherent differences" between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.

Virginia, 116 S. Ct. at 2276. Regardless of whether "differences" between the male and female breast are "natural" or "inherent," they are "obviously irrelevant" to all those employed as topless dancers. "By providing dissimilar treatment for men and women who are thus similarly situated, [section 12-10] violates the Equal Protection Clause." *Reed*, 404 U.S. at 77.

In short, because this case provides a ready vehicle for clarifying the category of "enduring" "[p]hysical differences between men and women" that carry legal significance, *Virginia*, 116 S. Ct. at 2276, and because Second Circuit's judgment contradicts settled law in any event, this Court should grant *certiorari* review.

II.

THE SECOND CIRCUIT'S FIRST AMENDMENT RULING CONFLICTS WITH NUMEROUS HOLDINGS OF THIS COURT, AND WITH THOSE OF THE FIRST, THIRD, AND NINTH CIRCUITS.

Relying on *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the court of appeals rejected petitioners' viewpoint discrimination challenge to section 12-10's disparate treatment of topless dance clubs ostensibly because "the Zoning Amendment is not *aimed* at suppressing the viewpoint of female eroticism." 13a (emphasis added). Even under the "time, place, and manner" analysis applied in *Renton*, however, *see* 475 U.S. at 46-47, the Second Circuit's application of the governing First Amendment principles was erroneous.

This Court has recently, repeatedly, and consistently admonished that " '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.' " *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S.

105, 117 (1991) (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)); *see also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). Mindful of this warning, the Ninth Circuit has concluded that "government must remain scrupulously neutral when it regulates activity protected by the First Amendment," and that courts should "not hesitate[ ] to strike down laws that are facially neutral but have discriminatory impact on First Amendment rights." *Service Employees Int'l Union v. Fair Political Practices Comm.*, 955 F.2d 1312, 1320 (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992). Similarly, the First Circuit has held that the mere "unrebutted *appearance* of viewpoint discrimination," much less intentional censorship, violates the First Amendment. *Aids Action Comm. v. MBTA*, 42 F.3d 1, 10 (1st Cir. 1994). The decision below, which rests on New York City's seeming lack of discriminatory motive in enacting section 12-10, conflicts with these more exacting First Amendment standards.

Moreover, *Renton* does not insulate section 12-10 from petitioners' viewpoint discrimination claim. *Renton* upheld an adult-business zoning regulation against a content-discrimination challenge because the challenged ordinance was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." 475 U.S. at 47. *Renton* did not suggest, however, that the "secondary effects" rationale would support the content-neutrality of a zoning ordinance that places restrictions on adult entertainment businesses according to the particular erotic messages that they convey to their customers. To the contrary, this Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co.*, 460 U.S. at 592. Because "[v]iewpoint discrimination is . . . an egregious form of content discrimination," *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819,

829 (1995), *Renton*'s "secondary effects" rationale should not extend to this case.

Indeed, there can be no question that section 12-10 discriminates against protected erotic expression on the basis of both content and viewpoint. New York City permits the existence of topless dance clubs, but imposes onerous zoning restrictions only upon clubs featuring female performers. "Thus, by any commonsense understanding of the term, [section 12-10] is content based," and therefore cannot qualify as a valid time, place and manner restriction. *Discovery Network, Inc.*, 507 U.S. at 429; *see also Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Carey v. Brown*, 447 U.S. 455, 460-61 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972).

Whether or not intentional, it is also obvious that section 12-10's challenged gender classification burdens only expression conveyed by women. As Justice Souter has observed,

> where [a] dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of the erotic experience.

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (1991) (Souter, J. concurring in the judgment). Clearly, the dancer's sex is an essential aspect of his or her endorsement. *See City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994). For example, the erotic message that Vanessa conveys to her male audiences at the Cozy Cabin communicates a different "premise," "perspective," or "standpoint" on human sexuality, *Rosenberger*, 515 U.S. at 831, than the message conveyed by male dancers in New York City's gay clubs, *accord Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995) (parade participation by gay and lesbian group would communicate a

"view that people of their sexual orientation have as much a claim to unqualified social acceptance as heterosexuals"); *see also Williams v. City of Fort Worth*, 782 S.W. 2d 290, 297 (Tex. App. 1989) (whether "the breasts of female topless dancers, unlike their male counterparts, are commonly associated with sexual arousal" is a "viewpoint [that] might be subject to reasonable dispute, depending on the sex and sexual orientation of the viewer").

By enacting the gender distinction contained in section 12-10, New York City has "regulate[d] speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Given that topless dancing is permitted by the city, the statute's disparate treatment of clubs featuring female performers selectively limits the ability of those dancers to express their views "on an otherwise includible subject," *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) (internal quotation marks omitted). This is the very essence of viewpoint discrimination, and section 12-10 is therefore "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Furthermore, New York City completely "failed to explain away" the viewpoint discrimination imposed by section 12-10. *Aids Action Comm.*, 42 F.3d at 10. Because the city made no inquiry whatsoever as to any gender-related impacts that erotic performers may or may not have on the surrounding communities, there is no evidentiary basis in the record to uphold the challenged distinction. This Court has repeatedly held that a purported time, place, and manner regulation may only discriminate within a general class of speech upon a showing that the restricted expression is " 'clearly more disruptive' " than the unrestricted expression. *Carey*, 447 U.S. at 459-60 (quoting *Mosley*, 408 U.S. at 100); *see also Metromedia, Inc. v. San Diego*, 453 U.S. 490, 513 (1981) (plurality); *accord Schad v. Mount Ephriam*, 450 U.S. 61, 73

(1981). Simply put, "even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975).[6]

On this point, the Court's decision in *Discovery Network*, 507 U.S. at 430, should be controlling. Requiring a demonstrable correlation between a challenged speech restriction and the particular secondary effects that the restriction was alleged to mitigate, the Court in *Discovery Network* refused to apply *Renton*'s "secondary effects" analysis to sustain a newsrack regulation that distinguished between newspapers and commercial handbills. *Id.* ("In contrast to the speech at issue in *Renton*, there are no secondary effects attributable to [newsracks for handbills] that distinguish them from the newsracks [for newspapers] that Cincinnati permits to remain on the sidewalks."). Following this guidance, the Third Circuit has squarely held that, "[u]nder the secondary effects analysis, speech that is prohibited must produce a greater secondary effect than speech that is permitted." *Rappa v. New Castle County*, 18 F.3d 1043, 1069 (3d Cir. 1994). The Second Circuit has now taken a different view.

In sum, New York City has demonstrated absolutely no connection between the viewpoint discrimination imposed by

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6. Given that the New York City made no inquiry (or findings) with respect to the secondary effects of male topless establishments, the court of appeals' observation in dictum that the gender-neutral regulation of topless entertainment might be impermissibly overinclusive under the First Amendment, *see* 20a-22a, is completely unfounded. Furthermore, in making this observation, the court of appeals apparently ignored the limited nature of petitioners' legal challenge. Petitioners have never argued that either male or female nudity should be regulated in the same manner in all circumstances. Rather, petitioners merely assert that erotic topless entertainment should be treated equally, absent evidence that would justify discrimination.

section 12-10 and the general goal of reducing secondary effects. The court of appeals flatly ignored this defect. 9a-15a. Instead, staking all on New York City's promise of urban betterment, the Second Circuit has dangerously retreated from the strict controls historically placed upon time, place and manner restrictions — controls that have so far kept the "secondary effects" doctrine from becoming an easy cover for censorship. This deviation from established First Amendment jurisprudence warrants the Court's review.

CONCLUSION

For the foregoing reasons, petitioners seek a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MARCH 20, 1998

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2312—August Term, 1996

(Argued: July 18, 1997 Decided: March 20, 1998)

Docket No. 97-7585

ADELE BUZZETTI d/b/a COZY CABIN, and VANESSA DOE, the first and last names being fictitious,

Plaintiffs-Appellants,

—v.—

THE CITY OF NEW YORK, THE DEPARTMENT OF CITY PLANNING, THE DEPARTMENT OF BUILDINGS, THE NEW YORK CITY COUNCIL; RUDOLPH W. GIULIANI, JOSEPH ROSE and GASTON SILVA, in their offical capacities,

Defendants-Appellees.

Before:

WINTER, *Chief Judge*,
JACOBS and LEVAL, *Circuit Judges*.

Appendix A

The City of New York undertook to zone adult entertainment establishments. The definition of such establishments under the ordinance depends in part on employees' or performers' regular exposure of "specified anatomical areas," including the female breast. Plaintiffs sued for a declaration that the regulation violates free speech and equal protection. The district court dismissed.

Affirmed.

IVAN S. ALTER, New York, N.Y. (Alter & Alter, New York, N.Y.), *for Plaintiffs-Appellants*.

ELIZABETH S. NATRELLA, Assistant Corporation Counsel of the City of New York, New York, N.Y. (Paul A. Crotty, Corporation Counsel of the City of New York, Leonard J. Koerner, Albert G. Fredericks, Assistant Corporation Counsels of the City of New York, New York, N.Y., Of Counsel) *for Defendants-Appellees*.

LEVAL, *Circuit Judge*:

Plaintiffs Adele Buzzetti, doing business under the name of her cabaret, Cozy Cabin, which features topless female dancers, and Vanessa Doe, a topless dancer (using a fictitious name for the purposes of this suit), appeal from the dismissal of their complaint in the United States District Court for the Southern District of New York (John S. Martin, J.) seeking declaratory and injunctive relief against the enforcement of

a New York City zoning ordinance. The ordinance regulates the permissible locations of commercial establishments featuring various forms of adult entertainment. The plaintiffs argue that because the ordinance applies to female topless entertainment, but not to male topless entertainment, it violates both the First Amendment's Free Speech Clause and the Fourteenth Amendment's Equal Protection Clause. We affirm.

BACKGROUND

Prior to November 1994, New York City's zoning law did not distinguish between adult entertainment and other commercial establishments. In late 1993, the Department of City Planning (the "DCP") undertook an "Adult Entertainment Study" (the "DCP study") to help the City Planning Commission (the "CPC" or the "Planning Commission") determine whether, like many other municipalities, New York City should adopt zoning regulations directed at adult entertainment establishments. This study was completed in September 1994. The DCP study included both a survey of numerous studies undertaken elsewhere—including Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California; Austin, Texas; Phoenix, Arizona; Manatee County, Florida; New Hanover County, North Carolina; and the State of Minnesota—and an examination of the nature and effects of adult entertainment establishments in New York City. With respect to New York City, the DCP study referred to previous studies of adult entertainment establishments conducted by other organizations, including an August 1993 Chelsea Action Coalition and Community Board 4 study and an April 1994 study by the Times Square Business Improvement District, as well as to testimony taken at an October 1993 public hearing held by the Borough of Manhattan's Task Force

on the Regulation of Sex-Related Businesses. In addition, the DCP conducted its own survey of adult entertainment establishments in New York City, focusing principally on three types of establishments: adult video and book stores, adult theaters, and topless or nude bars.

Based on these sources, the DCP study concluded that adult entertainment constituted a serious and growing problem in New York City. It noted that studies from other cities had documented numerous "negative secondary impacts" of such establishments, including "increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life." DCP Study at 67. These effects were consistent with the experience of those areas of New York City marked by high concentrations of adult entertainment establishments, the study concluded. Even in areas where adult establishments were not heavily concentrated, residents, businesses, and community leaders feared the consequences of possible future proliferation. The DCP study found that there had been a sharp increase in the overall number of adult entertainment establishments in New York City in the previous 10 years, including a 26 percent increase in topless/nude bars. The DCP therefore recommended special zoning restrictions on adult entertainment.

In November 1994, the New York City Council approved a one-year interim zoning moratorium on the opening or enlargement of adult establishments. In March 1995, the DCP and the New York City Council Land Use Committee filed a joint land use review application to amend the city's zoning law to establish permanent zoning regulations applicable to adult establishments. After receiving comments from the city's five borough boards and 39 community boards, and after holding its own public hearings, the CPC approved the proposed permanent regulations on September 18, 1995. Based on the DCP study, other reports, and public testimony,

the Planning Commission concluded that there were "substantial adverse secondary effects stemming from the location and concentration of adult uses" in New York, including "the negative impact adult establishments have on economic development and revitalization; their tendency to decrease property value, thereby limiting tax revenue; [the] impediment [created] to economic activity; their tendency to encourage criminal activity, particularly when the establishments are located in concentration; the proliferation of illegal sex-related businesses; their damaging impact on neighborhood character and residents including children; and the costs associated with maintaining and patrolling areas." Following additional public hearings, on October 25, 1995, the City Council approved the permanent restrictions, effective immediately. It is this set of permanent zoning restrictions ("the Zoning Amendment" or "the Amendment") that are at issue in this case.

The Zoning Amendment does not forbid the operation of any category of business. Instead, it restricts the areas in which certain sexually-oriented businesses may operate. The Zoning Amendment's regulatory scheme applies to all "adult establishment[s]," which is defined to mean a commercial establishment, a "substantial portion" of which is used as: an "adult book store," an "adult theater," an "adult eating or drinking establishment," or some "other adult commercial establishment" (or some combination of these). Zoning Amendment, § 12-10. Businesses fall into one of these categories of "adult establishments" if they "regularly feature" or devote a "substantial portion" of their business to entertainment or material emphasizing "specified anatomical areas" or "specified sexual activities." *Id.* For example,

> An adult eating or drinking establishment is an eating or drinking establishment which regularly features any one or more of the following:

> (1) live performances which are characterized by an emphasis on "specified anatomical areas" or "specified sexual activities"; or
>
> . . .
>
> (3) employees who, as part of their employment, regularly expose to patrons "specified anatomical areas." and
>
> which is not customarily open to the general public during such features because it excludes minors by reason of age.

Id. And:

> An adult theater is a theater which regularly features one or more of the following:
>
> . . .
>
> (2) live performances characterized by an emphasis on "specified anatomical areas" or "specified sexual activities", and
>
> which is not customarily open to the general public during such features because it excludes minors by reason of age.

Id.

For purposes of this appeal, the following two definitions are pivotal:

> "specified sexual activities" are: (i) human genitals in a state of sexual stimulation or arousal; (ii) actual or simulated acts of human masturbation, sexual intercourse or sodomy; or (iii) fondling or other erotic touching of human genitals, pubic region, buttock, anus or *female* breast.

> "Specified anatomical areas" are: (i) less than completely and opaquely concealed: (a) human genitals, pubic region, (b) human buttock, anus, or (c) *female* breast below a point immediately above the top of the areola; or (ii) human male genitals in a discernibly turgid state, even if completely and opaquely concealed.

Id. (emphasis added).

Based upon these definitions, the Zoning Amendment regulates the locations at which adult establishments may operate. In addition to the general ban on commercial establishments in residentially-zoned areas of New York City, the Amendment completely forbids adult establishments from operating in certain other specified areas of the city. *See* Zoning Amendment, §§ 32-01, 42-01. Moreover, in those areas where adult establishments are permitted to locate, the establishments, subject to certain exceptions, may not be located within 500 feet of any school, day care center, or house of worship, nor within 500 feet of the edge of most residential areas. *See id.* In addition, to prevent concentration of adult establishments, the Zoning Amendment generally provides that no adult establishments may be located within 500 feet of any other adult establishment. *See id.* A one-year transition period (with the possibility of additional extensions of time) is provided for non-conforming adult establishments existing at the time of enactment of the Zoning Amendment.

On October 10, 1996, the plaintiffs-appellants filed a complaint alleging that the Zoning Amendment violated the Equal Protection Clause and the First Amendment, and sought injunctive and declaratory relief on that basis. The complaint alleged that Buzzetti's cabaret, Cozy Cabin, which regularly features barechested female dancers, would be economically unable to relocate as required by the Zoning

Amendment and therefore would be forced to close. In addition, the complaint alleged that plaintiff Doe is a topless dancer, and that the Zoning Amendment will restrict her ability to earn a livelihood, as well as her ability to express herself through her dancing.

The district court denied plaintiffs' motion for a preliminary injunction, finding that they had not demonstrated a likelihood of success on the merits of their constitutional claims. *See Buzzetti v. City of New York*, 96 Civ. 7764, 1997 WL 164284, at *6 (S.D.N.Y. April 8, 1997). Relying on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986), the district court determined that the New York ordinance was not viewpoint-discriminatory, but rather constituted "a content-neutral time, place, and manner regulation" and, as such, passed constitutional muster if it " 'is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication.' " *Buzzetti*, 1997 WL 164284, at *3 (quoting *Renton*, 475 U.S. at 50, 106 S. Ct. at 930). This test was met because, the court found, New York's "interest in preventing crime, maintaining property values, and preserving the quality of the city's neighborhoods is both important and substantial" and "the Zoning Amendment also provides for reasonable alternative avenues of communication in numerous zoning districts throughout the city." *Id.* The district court also concluded that the Zoning Amendment did not run afoul of the Equal Protection Clause as "gender-biased." The court noted that the ordinance was aimed at the secondary effects produced by adult entertainment, and "in our culture the public display of female breasts will have far different secondary effects than the public display of male breasts. Rightly or wrongly, our society continues to recognize a fundamental difference between the male and female

breast." *Id.* at *4. Finally, citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S. Ct. 461 (1955), the court noted the broad discretion afforded legislative bodies in determining which aspects of general social problems should be targeted for regulation. *See id.* at *5.

Having denied the plaintiffs a preliminary injunction, the district court, pursuant to the parties' joint stipulation, entered final judgment denying plaintiffs' claims for declaratory and injunctive relief and dismissing plaintiffs' complaint. Plaintiffs brought this appeal contending that the Zoning Amendment violates the First Amendment because its regulation of female topless dancing, but not male topless dancing, constitutes a viewpoint-based restriction on expression suppressing the viewpoint of "female eroticism." In addition, they argue, the Zoning Amendment's differential treatment of male and female topless dancers constitutes a gender-based classification that cannot survive equal protection scrutiny.

DISCUSSION

I. First Amendment Claim

The district court correctly relied on *Young* and *Renton*. Both cases involved ordinances substantially similar to New York City's Zoning Amendment; each ordinance regulated adult business establishments based upon essentially the same definitions of "Specified Sexual Activities" and "Specified Anatomical Areas" as the New York Zoning Amendment, including the differential treatment of male and female toplessness. *See Young*, 427 U.S. at 53 n.4, 96 S. Ct. at 2444 n.4; *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 529 n.1 (9th Cir. 1984), *rev'd*, 475 U.S. 41, 106 S. Ct. 925 (1986). In *Young*, the Court upheld Detroit's adult film zoning ordinance, despite the fact that it singled out one

category of expression for special regulation. A plurality of the Court placed importance on the fact that the expression at issue was far from the "core" of First Amendment protections, noting that "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Young*, 427 U.S. at 70, 96 S. Ct. at 2452 (plurality); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66, 111 S. Ct. 2456, 2460 (1991) (plurality opinion) (quoting language from previous cases "support[ing] the conclusion . . . that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.").

Thus, the *Young* Court held, "[e]ven though the First Amendment protects communication in this area from total suppression . . . the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Young*, 427 U.S. at 70-71, 96 S. Ct. at 2452 (plurality). Stressing that "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems," the *Young* plurality concluded, with specific reference to Detroit's ordinance, that "[s]ince what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures." *Id.* at 71-72, 96 S. Ct. at 2453 (footnote omitted).

Appendix A

Renton built directly upon the *Young* framework. The dissent in *Renton* argued that the adult zoning ordinance at issue "discriminate[d] on its face against certain forms of speech based on content" because its restrictions applied only to theaters showing a certain kind of material—*i.e.*, sexually explicit films. *See Renton*, 475 U.S. at 57-58, 106 S. Ct. at 934 (Brennan, J., dissenting). The majority rejected this view. It acknowledged that "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment," and that "the [Renton] ordinance treats theaters that specialize in adult films differently from other kinds of theaters." *Renton*, 475 U.S. at 46-47, 106 S. Ct. at 928-29 (citations omitted). The *Renton* majority nonetheless viewed the ordinance as content-neutral; "as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." *Id.* at 47, 106 S. Ct. at 929.

In reaching this conclusion, the Supreme Court looked to the overall purpose of the ordinance. Whereas the district court had found the Renton City Council's " '*predominate* concerns' [in enacting the ordinance] were with the secondary effects of adult theaters, and not with the content of adult films themselves," the court of appeals had applied a more stringent test, under which "if '*a motivating factor*' in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision." *Id.* (citations omitted). According to the Supreme Court, the court of appeals had erred in not looking to the overall purpose of the ordinance:

> The District Court's finding as to "predominate" intent, . . . is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views.

Id. at 48, 106 S. Ct. at 929 (alterations in original). As a result, the Court ruled,

> the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." . . . The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication.

Id. at 48, 50, 106 S. Ct. at 929, 930 (citations omitted).

The appellants argue that *Young* and *Renton* are distinguishable because neither addressed the issue whether the differential treatment of male and female toplessness constituted an impermissible viewpoint restriction. In considering this argument, we need not decide whether appellants have accurately characterized female topless dancing as conveying, for First Amendment purposes, the "viewpoint" of "female eroticism." For even assuming the correctness of plaintiff's contention, we do not think that the Zoning Amendment represents an attempt by New York City to disfavor the viewpoint of female eroticism.

We recognize that "[v]iewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829, 115 S. Ct. 2510, 2516 (1995).

We think it clear, however, that the viewpoint of "female eroticism" did not constitute New York City's "rationale for the restriction[s]" in the Zoning Amendment. As the district court found, "the record does not indicate that the city was aiming to suppress free expression or to disadvantage women who want to perform barechested, as opposed to similarly situated men. Rather, after careful study the city decided to regulate the zoning rights of adult establishments in an effort to address the negative impact such establishments have on the surrounding community." *Buzzetti*, 1997 WL 164284, at *3. Moreover, the Zoning Amendment by its terms applies both to male and female erotic dancers. All but one of the defined "specified sexual activities" apply to males as well as females, and all but one of the defined "specified anatomical areas" apply to males, as well. Moreover, the definition of "specified anatomical areas" also singles out "male genitals in a discernably turgid state." Zoning Amendment, § 12-10. In sum, we agree with the district court that the Zoning Amendment is not aimed at suppressing the viewpoint of female eroticism, and is properly viewed, under *Renton*, as a content-neutral time, place, and manner regulation.

We therefore uphold the New York ordinance. With respect to the first requirement for upholding content-neutral regulations, the Supreme Court has made clear that concerns similar to those advanced by New York City, such as preventing crime, maintaining property values, and preserving the quality of urban life and the character of city neighbor-

hoods, constitute "substantial governmental interest[s]." *See Renton*, 475 U.S. at 48, 50, 106 S. Ct. at 929, 930; *see also Young*, 427 U.S. at 71, 96 S. Ct. at 2453 (plurality) ("[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."). In addition, *Renton* emphasized that city officials were not required to make particular findings regarding the secondary effects of adult entertainment in Renton itself, but rather were "entitled to rely on the experiences of . . . other cities." *Renton*, 475 U.S. at 51, 106 S. Ct. at 931; *see id.* at 51-52, 106 S. Ct. at 931 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."). Thus, New York City's reliance on studies from a variety of other areas of the country was well-placed. But, as indicated above, New York City went beyond this minimal requirement: the DCP conducted its own detailed study, consulted other studies conducted in particular neighborhoods of New York City, and considered testimony given at public hearings in New York. As the District Court found:

> The city has adequately documented the evidence supporting its decision to enact a zoning regulation to help counter the negative secondary effects it believed were caused by adult establishments throughout New York City. . . . Such impacts include increased crime, reduced property value, and a perceived decline in the community character. The negative secondary effects associated with adult establishments and relied on as the impetus for the Zoning Amendment were extensively studied and documented before the Ordinance was adopted. . . . Defendants' interest in preventing crime,

> maintaining property values, and preserving the quality of the city's neighborhoods is both important and substantial.

Buzzetti, 1997 WL 164284, at *3 (footnote omitted).

Finally, there can be no doubt on this record that the Zoning Amendment allows for "reasonable alternative avenues of communication." The *Renton* Court noted that because the Renton ordinance left "some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites," even though little or none of it might be " 'commercially viable,' " "reasonable alternative avenues" remained. 475 U.S at 53-54, 106 S. Ct. at 932. In comparison, as the district court found in the instant case, "Eleven percent of New York City's total land area remains as permissible locations for adult establishments to operate. The Zoning Amendment certainly allows for alternative sites for adult establishments to operate." *Buzzetti*, 1997 WL 164284, at *5 n.13. Furthermore, the DCP has estimated that the Zoning Amendment "allow[s] for the operation of approximately 500 adult establishments in New York City" in comparison to the approximately 177 adult establishments currently operating in the city; "[a]ccordingly, the Amendment[ ] permit[s] all of the City's existing adult establishments to continue to operate in the City, either at their current sites or at new locations." *See also Stringfellow's of New York, Ltd. v. City of New York*, Nos. 17, 18, 19, __ N.Y.2d ___, ___, 1998 WL 77749, at *9-*10 (Feb. 24, 1998) (uncorrected slip op.).

We therefore agree with the district court, under the authority of *Young* and *Renton*, that the New York City Zoning Amendment is a content-neutral time, place, and manner regulation, is justified by substantial government interests and allows for reasonable alternative avenues of communication, and, accordingly, does not violate the First Amendment.

II. Equal Protection Claim

Appellants also argue that the Zoning Amendment's differential regulation of male and female topless dancing constitutes an invidious gender distinction, in violation of the Equal Protection Clause. The Supreme Court has recently "summarize[d] the Court's current directions for cases of official classification based on gender" as follows:

> Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proferred justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

United States v. Virginia, 518 U.S. 515, ___, 116 S. Ct. 2264, 2275 (1996) (alteration in original) (citations omitted).

"It is clear that '[g]ender has never been rejected as an impermissible classification in all instances.' " *Rostker v. Goldberg*, 453 U.S. 57, 69 n.7, 101 S. Ct. 2646, 2654 n.7 (1981) (quoting *Kahn v. Shevin*, 416 U.S. 351, 356 n.10, 94 S. Ct. 1734, 1737-38 n.10 (1974)). The Court recently reaffirmed in *Virginia* that "[t]he heightened review standard our precedent establishes does not make sex a proscribed classification. . . . Physical differences between men and women . . . are enduring: [T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Virginia*, 518 U.S. at

___, 116 S. Ct. at 2276 (alterations in original) (internal quotation marks and citations omitted).

Thus, the Court has noted that "because the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact . . . to be treated in law as though they were the same, this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469, 101 S. Ct. 1200, 1204 (1981) (plurality opinion) (internal quotation marks and citations omitted). Statutes that fairly can be seen as responding to clear sexual differences between men and women are among those laws that courts have upheld, despite the gender-based classifications contained in them. *See*, *e.g.*, *id.* at 471-73, 101 S. Ct. at 1205-06 (upholding statutory rape law designed, *inter alia*, to prevent illegitimate teenage pregnancies under which only men could be held criminally liable because "[o]nly women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity"; the statute was thus "sufficiently related to the state's objectives to pass constitutional muster"); *Liberta v. Kelly*, 839 F.2d 77, 82-83 (2d Cir.), *cert. denied*, 488 U.S. 832, 109 S. Ct. 89 (1988) (upholding, against equal protection challenge, a New York rape statute criminalizing coerced intercourse with females by males, but not coerced intercourse with males by females; "we find it inconceivable that males who rape should go free solely because the legislature focused on a real problem, rape of women by men, with verified attendant physical and psychological trauma, and failed to act on a hypothetical problem, rape of men by women"); *United States v. Davis*, 785 F.2d 610, 614 (8th Cir. 1986) (same; citing cases).

Applying these principles to the Zoning Amendment, we conclude that, for the reasons stated in our discussion of appellants' First Amendment claim, New York City's objectives of preventing crime, maintaining property values, and preserving the quality of urban life, are important. We also believe that the Zoning Amendment's regulation of female, but not male, topless dancing, in the context of its overall regulation of sexually explicit commercial establishments, is substantially related to the achivement of New York City's objectives.

In this latter connection, we note first that under the Supreme Court's tests for gender classifications, "[t]he relevant inquiry . . . is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the [legislature] is within constitutional limitations." *Liberta*, 839 F.2d at 83 (quoting *Michael M.*, 450 U.S. at 473, 101 S. Ct. at 1206 (plurality opinion)) (alterations in *Liberta*). Here, as described above, New York City officials, in addition to canvassing numerous prior studies regarding the secondary effects of adult establishments, also conducted their own study of the problem in New York. One of the adult establishments surveyed as part of the DCP study was, as appellants put it, "the well-known male topless bar Chippendales." *See* DCP Study, Appendix B. After reviewing the results of the DCP study, as well as other studies and public testimony, the city "carefully drafted" the Zoning Amendment "to cover only the types of establishments that have been found to produce negative impacts on the communities in which they are located," according to Joseph B. Rose, the Chairman of the CPC and the Director of the Planning Commission. Rose's uncontradicted affidavit also indicates that "the vast majority of topless clubs in New York City employ female entertainers exclusively" and "[a]ccording to studies conducted in New York and in other municipalities, . . . it is those clubs

that tend to produce negative impacts, such as a reduction in the value of nearby properties and an impairment in the character of the surrounding community." Having thoroughly examined the problems of adult entertainment, the DCP, Rose reported, "has no evidence that [male topless clubs] create the type of negative community impacts that the adult establishments covered by the Amendment[ ] tend to produce."

In short, New York City carefully studied the contours of the problem it was seeking to address and legislated in accordance with its findings. "We simply have no basis on this record for assuming that [New York] will not, in the future, amend its ordinance to include other kinds of adult businesses that [are] shown to produce the same kinds of secondary effects." *Renton*, 475 U.S. at 53, 106 S. Ct. at 931-32.

Moreover, as the district court pointed out in support of its conclusion that the Zoning Amendment was not gender-biased, numerous courts have recognized that the societal impacts associated with female toplessness are legitimate bases for regulation. *See, e.g., United States v. Biocic*, 928 F.2d 112, 115-16 (4th Cir. 1991) (upholding a public indecency statute that applied to topless females but not topless males, and noting that, in our society, the "erogenous zones . . . . still include (whether justifiably or not in the eyes of all) the female, but not the male, breast"). Indeed, courts have considered, and rejected, equal protection challenges quite similar to Buzzetti's and Doe's, against adult entertainment regulations like New York City's Zoning Amendment. *See, e.g., SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1279-80 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052, 109 S. Ct. 1310 (1989) (considering a similar ordinance regulating adult entertainment, and concluding that "[t]he district court did not err in holding that such regulation of female breasts is substantially related to the City's interest in reg-

ulation"); *Tolbert v. City of Memphis*, 568 F.Supp. 1285, 1290 (W.D.Tenn. 1983) ("The only aspect of the ordinance at issue in this case that could be construed as discriminating against women on its face is directed solely against the exposure of the female breast in a public place. In our culture, for the purpose of this type [of] ordinance, female breasts are a justifiable basis for a gender-based classification."); *cf. Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1256-57 (5th Cir. 1995) (rejecting a challenge brought under the Texas Equal Rights Amendment to a similar ordinance).

Given New York City's objective, which is not to oppress either gender's sexuality but to control effects that flow from public reaction to the conduct involved, we must recognize that the public reactions to the exhibition of the female breast and the male breast are highly different. The male chest is routinely exposed on beaches, in public sporting events and the ballet, and in general consumption magazine photography without involving any sexual suggestion. In contrast, public exposure of the female breast is rare under the conventions of our society, and almost invariably conveys sexual overtones. It is therefore permissible for New York City, in its effort to achieve the objectives of the Zoning Ordinance, to classify female toplessness differently from the exhibition of the naked male chest. This does not constitute a denial of equal protection.

Finally, although we need not rest our decision on this basis, we note that, given the city's findings, regulating both male and female topless entertainment might have burdened more expressive activity than necessary, thus creating potential First Amendment problems. For example, in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176 (1981), the Court struck down an ordinance banning all live entertainment within the Borough of Mount Ephraim, New Jersey. "Even if Mount Ephraim might validly place restric-

tions on certain forms of live nude dancing under a narrowly drawn ordinance, this would not justify the exclusion of all live entertainment . . . ." *Id.* at 73 n.15, 101 S. Ct. at 2185 n.15. Mount Ephraim's ordinance regulated too much speech because "[t]he Borough has presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems of this nature more significant than those associated with various permitted uses; nor does it appear that the Borough's zoning authority has arrived at a defensible conclusion that unusual problems are presented by live entertainment." *Id.* at 73, 101 S. Ct. at 2185. Similarly, in *Erznoznik v. Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268 (1975), the Court invalidated an ordinance prohibiting drive-in movie theaters from showing films containing nudity when the screen was visible from a public street or place. Insofar as the ordinance was aimed at prohibiting youth from viewing the films, it regulated too much expression. "The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, . . . scenes from a culture in which nudity is indigenous [or] shots of bathers on a beach. . . . Clearly all nudity cannot be deemed obscene even as to minors." *Id.* at 213, 95 S. Ct. at 2274-75 (emphasis omitted).

Referring to these precedents, the Court pointed out in *Renton* that "the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad* . . . and *Erznoznik* . . . ." *Renton*, 475 U.S. at 52, 106 S. Ct. at 931; *see also Young*, 427 U.S. at 82, 96 S. Ct. at 2458 (Powell, J., concurring in part and concurring in the judgment) ("The

evidence presented to the Common Council indicated that the urban deterioration was threatened, not by the concentration of *all* movie theaters with other 'regulated uses,' but only by a concentration of those that elected to specialize in adult movies. The case would present a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas.") (footnotes omitted). By implication, if, after conducting a thorough examination in which only topless entertainment by female performers was "shown to produce" the unwanted secondary effects, New York City nonetheless regulated male topless entertainment, the City might have violated the First Amendment.

In any event, we conclude that appellants have shown no equal protection violation. The Zoning Amendment is substantially related to the City's important objectives in controlling the secondary effects of adult entertainment, and the City has provided the "exceedingly persuasive" justification for its differential regulation of male and female topless performances required under *Virginia*. " '[T]he gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated' in this case." *Rostker*, 453 U.S. at 79, 101 S. Ct. at 2659 (quoting *Michael M.*, 450 U.S. at 469, 101 S. Ct. at 1204 (plurality opinion)).

CONCLUSION

The judgment of the district court is affirmed.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 8, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 7764 (JSM)

ADELE BUZZETTI d/b/a COZY CABIN, and VANESSA DOE, the first and last names being fictitious,

Plaintiffs,

- v. -

THE CITY OF NEW YORK, THE DEPARTMENT OF CITY PLANNING, THE DEPARTMENT OF BUILDINGS, THE NEW YORK CITY COUNCIL, and RUDOLPH W. GIULIANI, JOSEPH B. ROSE and GASTON SILVA, in their official capacities,

Defendants.

OPINION AND ORDER

JOHN S. MARTIN, Jr., District Judge:

Plaintiffs, the proprietor of Cozy Cabin, a cabaret that features live female dancers who perform topless on stage, and a female dancer who performs at the Cozy Cabin and other establishments that feature female topless dancers, seek to have this Court preliminarily enjoin the enforcement of a New York City zoning regulation pertaining to adult establishments. Plaintiffs

challenge the regulation on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment because it impermissibly restricts the zoning of establishments featuring female topless dancers, but not those featuring male topless dancers. Plaintiffs also claim that the zoning regulation is a viewpoint-based restriction on constitutionally protected expression and as such violates the guarantees of the First Amendment.

DISCUSSION:

The Zoning Amendment:

The City Council enacted Text Amendment N950384ZRY to the Zoning Resolutions of the City of New York ("Zoning Amendments or Ordinance) in October of 1995. According to the Joint Report of the Land Use Committee and Subcommittee on Zoning and Franchises of the City Council, the Zoning Amendment was enacted as part of an effort to address the adverse secondary effects that have been shown to emanate from adult establishments. *See* Joint Report of the Land Use Committee and the Subcommittee on Zoning and Franchises of the City Council, dated October 24, 1995. ("Joint Committee Reports"). According to the Joint Committee Report, evidence of the adverse secondary effects of adult establishments has been Amply documented." The Joint Committee Report makes specific reference to studies prepared by the Department of City Planning, the Times Square Business Improvement District, and the Chelsea Action Coalition, as well as testimony presented to the City Council and the City Planning Commission. According to the Joint Committee Report, the various studies and testimony indicate that adult establishments impact "crime, property values, economic development, neighborhood character and the overall

quality of lifer within a community. (Joint Committee Report at 3).[1]

The Zoning Amendment specifically limits the permissible zones or districts in New York City where adult establishments may operate.[2] The Ordinance also requires that adult establishments be dispersed within the permissible zones to prevent a cluster of such establishments in any one area of the city and to ensure that such businesses are not located near any residential or certain commercial zones.[3] The Zoning Amendment does not ban adult establishments outright; rather it limits them to specific areas of New York City where such establishments may legally operate.[4]

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1. The Joint Committee Report states that the "proposed text [of the Zoning Amendment], as modified by the City Planning Commission, represents a carefully targeted response to the adverse secondary effects adult establishments have on residential and commercial neighborhoods." (Joint Committee Report at 3).

2. Sections 32-01 and 42-01 detail the zoning districts where adult establishments may and may not be located as well as the proximity limits applicable to such establishments.

3. The Zoning Amendment specifically requires that adult establishments: (1) must be located at least 500 feet from a church, school, residential district, or certain manufacturing and commercial districts; (2) must be located at least 500 feet from another adult establishment; (3) are limited to one-per zoning lot; and (4) may not-exceed 10,000 square feet of floor area and cellar space. See Zoning Amendment at §§ 32-01, 42-01.

4. [D]ata supplied by the Department of City Planning demonstrate that these regulations provide ample opportunity for the location and relocation of adult establishments in many areas throughout the city.

Appendix B

The zoning restrictions mandated by the Ordinance apply to various types of Adult establishments including adult bookstores, adult theaters, other adult commercial establishments, and, relevant to the action before this Court, adult eating or drinking establishments. *See* Zoning Amendment § 12-10. The classification of an eating or drinking establishment as "adult" is expressly predicated on the character of the activity that takes place in such establishment. If the establishment regularly features movies, photographs, or live performances that emphasize "specified anatomical areas"[5] or "specified sexual activities"[6] it is considered "adult" and therefore covered by the restrictions in the Ordinance. Included among the list of specified anatomical areas covered by the ordinance are the Female breast below a point immediately above the top of the areola." Specific sexual activities include, inter alia, the fondling or erotic touching of the female breast. While there are also specific restrictions on the showing or touching of uniquely male anatomy and shared human anatomy, the male breast is not specifically covered by section 12-10. Thus, bars that feature barechested female dancers are deemed adult establishments and, as such, are subject to the zoning restriction of section 12-10, while bars that feature barechested male dancers

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5. "Specified anatomical areas" are defined as (i) less than completely and opaquely concealed: (a) human genitals, pubic region, (b) human buttock, anus, or (c) female breast below a point immediately above the top of the areola; or (ii) human male genitals in a discernibly turgid state, even if completely and opaquely "concealed."

6. "Specified sexual activities" are defined as: "(i) human genitals in a state of sexual stimulation or arousal; (ii) actual or simulated acts of human masturbation, sexual intercourse or sodomy; or (iii) fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast."

are not necessarily covered by the Ordinance.[7] According to plaintiffs, such disparate treatment of female toplessness as opposed to male toplessness constitutes both invidious gender discrimination and prohibited content-based regulation of speech in violation of the Constitution.

Preliminary Injunctions:

Generally, in order to establish that a preliminary injunction is appropriate, the moving party must show:

> (a) that it will suffer irreparable harm in the absence of an injunction and (b) either (i) likelihood of success on the merits or (ii) sufficiently serious questions going to the merits to make them a fair ground for litigating and a balance of hardships tipping decidedly in the movant's favor.

Doherty Assoc., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 33 (2d Cir. 1995) (citations omitted). Where, however, the moving party Seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the above more rigorous standard applies. *NAACP v. Town of East Haven*, 70 F.3d 219, 223 (2d Cir. 1995). In such a case, the movant must demonstrate *both* irreparable harm and a likelihood of success on the merits. *Id.*; *see also Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996); *Molloy v. Metropolitan Transportation Authority*, 94 F.3d 808 (2d Cir. 1996); *Jolly v. Coughlin*, 76 F.3d 468 (2d

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7. Because Section 12-10 includes within its purview sexual activity and anatomical areas of males, bars which feature men who, for example, expose or fondle their buttocks or pubic region or who simulate the act would be covered by the Zoning Amendment and would have to either relocate or modify their entertainment. *See* discussion, *infra*.

Cir. 1996); *Union Carbide Agricultural Products Co. v. Costle*, 632 F.2d 1014 (2d Cir. 1980). Because plaintiffs in this action seek to enjoin governmental action taken in the public interest pursuant to a regulatory scheme, the above more rigorous standard for obtaining a preliminary injunction applies.

Likelihood of Success on the Merits:

Zoning Regulations — Constitutional Scrutiny:

As a general matter, municipalities are vested with a unique power to address land use problems through the enactment of zoning regulations. *See Moore v. City of East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932 (1977). Such power, however, is not infinite, and Must be exercised within constitutional limits. *Schad v. Borough of Mount Ephriam*, 452 U.S. 61, 68, 101 S. Ct. 2176, 2382 (1981) (citation omitted). The appropriate level of constitutional scrutiny applicable to the New York City Zoning Amendment depends on how that regulation is classified. One level of scrutiny would apply to a gender-based regulation[8] and another to a "content-based" regulation of expression,[9] while a wholly different level of scrutiny would apply to a "time, place,

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8. The Supreme Court handmade clear that gender-based classifications are subject to an Intermediates standard of review. To withstand equal protection scrutiny, such classifications must be justified as substantially related to a sufficiently important-governmental interest. *Mississippi Univ. For Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331 (1982); *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451 (1976).

9. *See. e.g., RAV v. City of St. Paul*, 505 U.S. 377, 385, 112 S. Ct. 2538, 2584 (1991) (content-based classifications subject equal protection scrutiny and valid only if necessary to accomplish a compelling governmental interest).

and manner" regulation aimed at eliminating negative secondary effects associated with a certain use of land. *See, e.g. International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 692, 112 S. Ct. 2711, 2715 (1991); *Clamp v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984).

The Supreme Court addressed the issue of which standard of review applies to the zoning of Adults establishments in two seminal cases — *Young v. Amend Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440 (1976) and, more recently, *City of Renton v. Playtime Theatrics, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). In Renton, the Court determined that because the ordinance at issue did not ban adult theaters altogether, but merely provided certain locational zoning restrictions on where they could legally operate, it should properly be analyzed as a form of time, place, and manner regulation. 475 U.S. at 46, 106 S. Ct. at 928. The Court went on to note that categorizing the ordinance as a time, place, and manner regulation is only the first step in the constitutional inquiry. *Id.* There is no dispute that regulations enacted for the purpose of restraining speech, or for the purpose of prejudicing one gender over another, are presumptively unconstitutional. *Carey v. Brown*, 447 U.S. 455, 462-63 and n.7, 100 S. Ct. 2286, 2291 and n.7 (1980); *Police Dept. Of Chicago v. Morley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 2289, 2291-92 (1972); *see also Michael M.*, 450 U.S. 464, 101 S. Ct. 1200 (1981), *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S. Ct. 1497, 1499 (1966). "On the other hand, so-called 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *Renton*, 475 U.S. at 47, 106 S. Ct. at 928 (citations omitted). The *Renton* Court ultimately ruled that because the city's ordinance was predominately aimed not at the

content of the adult films shown in the adult theaters, but at the secondary effects of such theaters on the surrounding community, it was a constitutionally valid content-neutral regulation. *See generally Nakatomi Investments, Inc. v. Schenectady*, 949 F. Supp. 988, 1001 (N.D.N.Y. 1997).

This Court finds that the same is true of the ordinance at issue in-this case — it is a content-neutral time, place, and manner regulation. As such, the appropriate inquiry is whether the Zoning Amendment His designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton,* 475 U.S. at 50, 106 S. Ct. at 930 (citations omitted). The city has adequately documented the evidence supporting its decision to enact a zoning regulation to help counter the negative secondary effects it believed were caused by adult establishments throughout New York City. The Chairman of the New York City Planning Commission, who is also the Director of the New York City Department of City Planning, attests to the fact that the Zoning Amendment was enacted to protect the business and residential communities of the city from the negative impacts of the adult entertainment industry. Such impacts include increased crime, reduced property value, and a perceived decline in the community character. The negative secondary effects associated with adult establishments and relied on-as the impetus for the Zoning Amendment were extensively studied[10] and documented before the Ordinance was adopted. Despite plaintiffs contentions, the record does not indicate that the city was aiming

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10. The Department of City Planning undertook an Adult Entertainment Study" in late 1993 to determine the nature and the extent of impact adult establishments have on the surrounding community. As indicated by the record, the year-long study was extensive, thorough, and well-documented and included reference to numerous other studies both by local community groups and by other municipalities throughout the country.

to suppress free expression or to disadvantage women who want to perform barechested, as opposed to similarly situated men. Rather, after careful study the city decided to regulate the zoning rights of adult establishments in an effort to address the negative impact such establishments have on the surrounding community.

In deciding the appropriate tuition of an adult establishment, the city looked to other municipalities that already had adopted zoning regulations of the adult entertainment industry and the Planning Commission held a series of public hearings on the proposed amendments. Interestingly, New York City's Zoning Amendment mirrors the language of many other such statutes which have withheld constitutional scrutiny. *See, e.g., Young,* 427 U.S. at 53, 96 S. Ct. at 2444. Defendants' interest in preventing crime, maintaining property values, and preserving the quality of the city's neighborhoods is both important and substantial. Because the Zoning Amendment also provides for reasonable alternative avenues of communication in numerous zoning districts throughout the city, the ordinance meets the constitutional requirements for a content-neutral time, place, and manner zoning regulation.[11]

Scope of the Zoning Amendment:

Plaintiff attempts to demonstrate that the ordinance is gender-biased against women by noting that the survey of adult establishments underlying the decision to adopt the Zoning Amendment included Chippendales — a cabaret featuring barechested male dancers who perform for a primarily female audience. Plaintiff asserts that the zoning ordinance does not apply to establishments such as Chippendales and argues that it is defendants' burden in this action to justify why such clubs are

11. *See* discussion, *infra*, at note 13 and accompanying text.

not-covered. Additionally, plaintiffs argue that including Chippendales in the survey but not including the "male breast" under the definition of "specified anatomical areas" indicates that the zoning regulation adopted by the city was viewpoint-specific and impermissibly gender-biased.

Plaintiffs' arguments fail for a number of reasons. First, while it is true that the zoning ordinance would permit males to dance topless whereas females could not, it is not at all clear that Chippendales is not covered by the zoning ordinance definition of "specified anatomical areas" which includes bare "pubic area" or "buttock", regardless of sex, or the definition of "specified sexual activities" which includes "fondling or other erotic touching of human [i.e., male or female] genitals, pubic region for] buttock . . . ." Thus, there is no basis for drawing any inference from the fact that Chippendales was included in the survey but the definition of "specified anatomical areas" includes bare female breasts and not bare male breasts.

Second, even if we assume that Chippendales would not otherwise fall within the zoning law's definition of an adult establishment, that fact does not demonstrate that the ordinance was gender-biased. It must be remembered that the ordinance is not regulating the content of the performance but the secondary effects associated with the activity. There is nothing to suggest that the secondary effects from the presence of an establishment that features topless female dancers are not substantially different from the secondary effects of an establishment featuring topless male dancers. One does not have to be either a psychologist or a sociologist to recognize that, if it were widely known that ten topless women were walking down Park Avenue and ten topless men were walking down Madison Avenue, the effect on the traffic on Park Avenue would be substantially greater than on Madison Avenue.

Appendix B

As plaintiffs' expert has noted, Americans for many years seemed to focus erotic energy on women's breasts, much to the amazement of many Europeans and certainly to many African tribes in which breasts are usually bared." (Tiefer Affidavit at 3). Thus, even if we accept *arguendo* the view of plaintiffs' expert that the male and female breast are equally erotic, that does not change the fact that in our culture the public display of female breasts will have far different secondary effects than the public display of male breasts. Rightly or wrongly, our society continues to recognize a fundamental difference between the male and female breast.[12] *See, e.g., United States v. Biocic,* 928 F.2d 112, 115-16 (4th Cir. 1991) (Anatomies that traditionally in this society have been regarded as erogenous zones . . . still include (whether justifiably or not in the eyes of all) the female, but not the male breast.); *Craft v. Model*, 683 F. Supp. 289, 300 (D. Mass. 1988) ("Nature, not the legislative body, created the distinction between that portion of a woman's body and that of a man's torso. Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts.").

Moreover, including bare female, but not male, breasts in the definition of "specified anatomical areas" no more supports the conclusion that the zoning ordinance has a gender-biased anti-female intent than would a claim that the inclusion of human

12. This can be evidenced by the exhibits plaintiffs include with their motion papers. In a commercial context it may very well be erotic to show a man in a silk robe exposing his chest or a muscled male athlete wearing no shirt. However, society still will not tolerate advertisements that feature a female in the same state of undress — perfume advertisements could not tolerably depict a female model wearing a silk robe exposing her nude breasts, nor would a female athlete be photographed for a sunglasses advertisement wearing only running shorts with her breasts fully exposed. Regardless of whether it is true that the male breast is equally as erotic as the female breast, today's society continues to acknowledge a difference between a topless female and a topless male.

male genitals in a discernibly turgid states support the conclusion that the ordinance has an anti-male bias. These provisions simply recognize that there are anatomical differences between males and females which in our society elicit different reactions. Indeed, while plaintiffs' expert has attempted to establish that, like the female breast, the male breast may evoke an erotic response, plaintiffs have not argued that there are not substantial anatomical differences between the male and female breast. Again, one need not be a psychologist or sociologist, but only a casual peruser of the ads for topless establishments that regularly appear in the local press, to know that it is precisely the extent of the difference from the male breast that is emphasized as the primary attraction of the topless female dancers; indeed, it appears that many female dancers go to great lengths to surgically enhance their breasts in order to ensure that they could not possibly be mistaken for a male dancer. It does not strain the concept of judicial notice to recognize that the ads for places such-as Chippendales do not place a comparable emphasis on the extraordinary dimensions of the breasts of their male dancers.

Legislative Discretion and Zoning:

Furthermore, it is important to note that legislators are afforded broad discretion to decide precisely which problems to target for regulatory reform. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S. Ct. 461 (1955). In rejecting the claim that zthe city of Renton's ordinance was impermissible "underinclusive for its failure to regulate other adult businesses that would likely produce negative secondary effects similar to those generated by adult theaters, the Supreme Court expressly stated:

> That Renton chose first to address the potential problems created by one particular kind of adult

> business in no way suggests that the city has Singled outs adult theatres for discriminatory treatment. We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theatres.

Renton, 475 U.S. at 52-53, 106 S. Ct. at 931-32. Similarly, if New York City determines that the wage of the Zoning Regulation should be broadened to better address negative secondary effects from establishments that feature other forms of sexual activities or other anatomical areas, it is free to enact a further amendment. Nonetheless, New York City was justified in its decision to regulate the zoning of the adult establishments it determined after thorough review were the particular cause of documented negative secondary effects.

Finally, while municipalities cannot legislate adult entertainment without regard to the protections afforded free expression and gender equality inherent in the Constitution, the protection afforded erotica in general is of a lesser degree than other forms of expression. "[Elven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. *Young*, 427 U.S. at 70, 96 S. Ct. at 2452. The Supreme Court further notes that "[w]hether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the

citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice." *Id.*

The New York City Zoning Amendment at issue in this case does not ban any form-of commercial erotic expression, whether the expresser is male or female. Rather, the Ordinance regulates in a reasoned and appropriate manner in an effort to eliminate the negative secondary effects caused by certain establishments. The record is clear that the Zoning Amendment provides ample access to adult entertainment and materials for those who desire them.[13] New York City's Zoning Regulation, in accord with the rule of law established by the Supreme Court in both Young and Renton, is a constitutionally valid time, place, and manner regulation aimed at eliminating the secondary effects associated with adult establishments.

CONCLUSION:

The predominate concerns of the City defendants in enacting the Zoning Amendment were with the secondary effects of adult establishments, and not with the content of the expression, nor the gender of the expresser. The regulation is a content-neutral time, place, and manner regulation designed to serve a substantial governmental interest in attacking the negative impact associated

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13. Eleven percent of New York City's total land area remains as permissible locations for adult establishments to operate. The Zoning Amendment certainly allows for alternative sites for adult establishments to operate. See Zoning Amendment at §§ 3201, 42-01. As Justice Diamond of New York County Supreme Court noted in her decision in a case challenging the same zoning regulation in state court, "Those seeking to patronize adult establishments will be able to beat a path to their doors. While x-rated businesses may no longer be located on every street corner and may no longer dominate the Time Square area, as long as the current demand for them exists their numbers will certainly not lessen." *Stringfellow's of New York, Ltd. v. City of New York*, Nos. 113049/96, 103568/96, 103569/96, 1996 WL 776001. at * 14 (N.Y. Sup. Ct. Oct. 23 1996).

with the adult industry. The regulation does not unreasonably limit alternative avenues of communication; it is not a ban on the city's adult establishments and there are ample permissible zoning districts where such establishments can continue to do business. *See Renton*, 47S U.S. at 47, 106 S. Ct. at 928.

Because the Court finds that plaintiffs have not established a likelihood of success on the merits of their constitutional claims, a prerequisite for obtaining a preliminary injunction to stay governmental action taken in the public interest pursuant to a regulatory scheme, it is not necessary to discuss plaintiffs' claim of irreparable harm.

For the foregoing reasons, plaintiffs' motion for a preliminary injunction is denied.

SO ORDERED.

Dated: New York, New York

April 8, 1997

s/ John S. Martin, Jr., U.S.D.J.
JOHN S. MARTIN, JR., U.S.D.J.

APPENDIX C — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. I

"Congress shall make no law . . . abridging the freedom of speech[.]"

U.S. CONST. AMEND. XIV, § 1

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix C

RELEVANT EXCERPTS FROM SECTION 12-10 OF TEXT AMENDMENT N950384ZRY TO THE ZONING RESOLUTIONS OF THE CITY OF NEW YORK

* * *

Adult Establishment

An "adult establishment" is a commercial establishment where a "substantial portion" of the establishment includes an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof, as defined below:

* * *

(b) An adult eating or drinking establishment is an eating or drinking establishment which regularly features any one or more of the following:

(1) live performances which are characterized by an emphasis on "specified anatomical areas" or "specified sexual activities"; or,

* * *

(2) films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas"; or,

(3) employees who, as part of their employment, regularly expose to patrons "specified anatomical areas." and

which is not customarily open to the general public during such features because it excludes minors by reason of age.

* * *

For the purpose of defining "adult establishments", "specified sexual activities" are: (i) human genitals in a state of sexual stimulation or arousal; (ii) actual or simulated acts of human masturbation, sexual intercourse or sodomy; or (iii) fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast.

"Specified anatomical areas: are: (i) less than completely and opaquely concealed: (a) human genitals, pubic region, (b) human buttock, anus, or (c) female breast below a point immediately above the top of the areola; or (ii) human male genitals in a discernibly turgid state, even if completely and opaquely concealed.

* * *

Supreme Court, U.S.
FILED
JUN 26 1998
OFFICE OF THE CLERK

No. 97-1900

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ADELE BUZZETTI d/b/a COZY CABIN, and VANESSA DOE, the first and last names being fictitious,

Petitioners,

-v.-

THE CITY OF NEW YORK, THE DEPARTMENT OF CITY PLANNING, THE DEPARTMENT OF BUILDINGS, THE NEW YORK CITY COUNCIL, and RUDOLPH W. GIULIANI, JOSEPH B. ROSE, and GASTON SILVA, in their official capacities,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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GABRIEL TAUSSIG,
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June 25, 1998

COUNTER-QUESTIONS PRESENTED

1. Based on the controlling principles in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), is the challenged adult use zoning ordinance facially valid under the First and Fourteenth Amendments of the United States Constitution where the courts below correctly held that defendants demonstrated that it is content-neutral and not discriminatory on the basis of gender and is narrowly tailored to serve important governmental interests?

2. Whether plaintiffs failed to demonstrate that there is an impermissibly gender-based classification in the challenged adult use zoning ordinance in violation of the Equal Protection Clause where, as the courts below correctly recognized, the definitional terms parallel definitions in adult use zoning ordinances throughout the country, including the ones upheld by this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 53 (1976) and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 44 (1986), and are based upon legislative consideration of the well-documented negative secondary effects attributable to certain adult establishments?

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COUNTER-STATEMENT OF THE CASE

Respondents, the City of New York, *et al.*, respectfully request that this Court deny the petition by petitioners Adele Buzzetti, *et al.* ("petitioners" or "Buzzetti"), for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered March 20, 1998. Upon review of that opinion (App. A, 1a-22a),[1] petitioners do not raise any legal issue deserving this Court's review.

The Second Circuit's opinion, which affirmed a judgment of the United States District Court for the Southern District of New York, is reported as *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir. 1998), *stay denied*, 1998 U.S. LEXIS 4006 (June 15, 1998) (App. A, 1a-22a). The District Court's opinion is reported as *Buzzetti v. City of New York*, _F. Supp._, 1997 U.S. Dist. LEXIS 4383 (S.D.N.Y. Apr. 8, 1997) (App. B, 23a-37a).

In rejecting petitioners' gender bias and equal protection claims based on governing precedent from this Court, the courts below correctly held that the City's adult use zoning ordinance is a content-neutral ordinance that imposes a measured and appropriate set of land use restrictions on those types of adult establishments that have been shown in numerous studies to produce negative secondary impacts on the communities in which they are located. Topless bars featuring female entertainers are among the types of establishments that have been associated with such impacts and bars featuring topless male entertainers have not been. Therefore, the Zoning

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[1] Numbers and letters in parentheses preceded by "App." refer to the Appendix to the Petition for a Writ of Certiorari. Numbers in parentheses preceded by "JA__" refer to pages in the Joint Appendix submitted to the Second Circuit Court of Appeals.

Amendment does not violate the First Amendment and does not unlawfully discriminate on the basis of gender or violate the Equal Protection Clause, but rather is narrowly tailored to achieve its legitimate ends.

Background of New York City's Adult Use Zoning Amendment.

The background facts are summarized in the Court of Appeals' opinion (App. 3a-9a; *see also* 24a-27a). In brief, the extensive legislative record leading up to the passage of the Amendment to the New York City Zoning Resolution governing adult use establishments ("the Amendment") illustrates the careful study behind, and the reasonableness of, the Amendment.

Thus, in recent years, New York City, like many other localities, witnessed a significant increase in the number of establishments offering sexually-oriented adult entertainment (JA288). Such establishments include adult book and video stores, which often provide booths for on-premises viewing, adult theaters, which may offer movies or live entertainment, and topless or nude bars (JA288). Once found predominantly in Times Square and a few other areas, adult establishments more recently opened and proliferated in neighborhoods where they had not previously been located, including numerous triple-X video stores and nude bars in or near residential neighborhoods in the City, such as Chelsea in Manhattan, Sunset Park in Brooklyn, and Sunnyside and Forest Hills in Queens (JA288, JA72).

Prior to November 1994, the City's Zoning Resolution did not distinguish between adult establishments and other commercial activities (JA288-89). In response to concerns

expressed by citizens and their elected representatives about the proliferation of adult establishments and their adverse impacts, the City's land use planning bodies, the Department of City Planning ("DCP") and the City Planning Commission ("CPC"), conducted a thorough analysis of whether the City should adopt zoning regulations directed at adult establishments (JA288-89).

The DCP's Adult Entertainment Study ("the DCP Study") was completed in the fall of 1994 (JA44-134). It contains a survey of adult use studies performed by many other municipalities and the adult use zoning regulations they have adopted, including studies by the Town of Islip, New York; Los Angeles; Indianapolis; Phoenix; Austin, and a 1989 report of the Minnesota Attorney General (JA291-97, JA57-63, JA89-111).

The DCP Study also reviews previous studies in the City (JA293-95, JA89-101), such as a 1993 Chelsea Business Survey, indicating the negative impacts on Chelsea businesses of the recent proliferation of triple-X video stores and peep shows (JA294, JA215-41), and a 1994 Times Square Business Improvement District "(TSBID") Study of adult uses in Times Square (JA295, JA135-95). Finally, the DCP Study includes DCP's own survey of the impacts that even isolated adult establishments have had (JA289, JA44-144), including DCP's survey of selected study areas and of real estate brokers and community organizations (JA296-97, JA102-19).

Based on all these sources, the DCP Study concluded that the negative secondary effects of adult establishments constituted a serious and growing problem in New York City and therefore recommended special zoning restrictions (JA297,

JA120-21). As detailed in the Second Circuit's opinion, the DCP Study (App. 4a; *see* JA291-93, JA57-63):

> noted that studies from other cities had documented numerous "negative secondary impacts of such establishments, including "increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life." DCP Study at 67. These effects were consistent with the experience of those areas of New York City marked by high concentrations of adult entertainment establishments, the study concluded. Even in areas where adult establishments were not heavily concentrated, residents, businesses, and community leaders feared the consequences of possible future proliferation. . . .

After the City Council approved a one-year interim zoning moratorium in November 1994, the Council's Land Use Committee filed a joint land use review application in March 1995 to amend the Zoning Resolution to create permanent adult use regulations (JA297-98). Following thorough public comment and hearings, on September 18, 1995, the CPC approved the proposed comprehensive regulations (JA301, JA336).

The CPC's Report details the underlying planning considerations and bases for its findings, including the DCP Study, the TSBID Study, the Chelsea Business Survey, and various public testimony (JA313, JA334-50). It found that the "deleterious" secondary effects of adult establishments had "gone unchecked for too long a time," and were aggravated by the recent proliferation of adult uses, including in neighborhood retail and residential areas which historically did

not have such uses. The CPC concluded that the Amendment "is an appropriate and necessary response to the adverse secondary effects stemming from adult establishments," but "[a]t the same time, . . . continues to provide ample opportunity for adult establishments to locate and operate throughout New York City" (JA351-55). *See also* App. 4a-5a.

After public hearings before the City Council, where there was further testimony about the negative secondary impacts of adult uses, on October 25, 1995, the City Council approved the Amendment and it became effective on that date (JA301-302).

The Permanent Adult Use Zoning Amendment.

The permanent adult use Zoning Amendment ("the Amendment") does not forbid the operation of any category of business, but instead restricts the zoning areas in which an "adult establishment" may be operated (App. 5a). The term "adult establishment" is carefully defined to make clear that the regulations cover only the types of establishments that have been found to produce negative impacts on the communities in which they are located (JA302, JA24-38). An adult establishment is defined as a commercial establishment, a "substantial portion" of which is used as one of four types of facilities: an "adult book store," an "adult eating and drinking establishment," an "adult theater," or "other adult commercial establishment." N.Y.C. Zoning Resolution ("ZR"), § 12-10 (*see* App. C, 39a-40a). These establishments "regularly feature" or devote a "substantial portion" of their stock-in-trade to entertainment or material that is "characterized by an emphasis on" "specified anatomical areas" or "specified sexual activities." *Id.*

"Specified anatomical areas" are defined as: "(i) less than completely and opaquely concealed: (a) human genitals, pubic region, (b) human buttock, anus, or (c) female breast below a point immediately above the top of the areola; or (ii) human male genitals in a discernibly turgid state, even if completely and opaquely concealed." *Id.*; *see* App. 40a. "Specified sexual activities" are defined as: "(i) human genitals in a state of sexual stimulation or arousal; (ii) actual or simulated acts of human masturbation, sexual intercourse or sodomy; or (iii) fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast." *Id.*; *see* App. 40a; JA302-303. Identical or similar definitions are used in many of the zoning ordinances throughout the country that regulate adult uses (JA303).[2]

The centerpiece of the Amendment is a set of locational restrictions and anti-concentration provisions that are designed to shield the City's residential neighborhoods, and the facilities and commercial areas that serve them, from the negative

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[2] The terms "regularly features" and "characterized by an emphasis on" are used to make clear that the Amendment is applicable only to those establishments where entertainment or material with a predominant focus on sexual activities or anatomy is offered on a frequent, on-going basis (JA303-304). The Amendment is not intended to restrict entertainment or material containing incidental displays of nudity or sexual activity or establishments which offer adult entertainment on an occasional basis (*id.*).

In order to further ensure that establishments offering mainstream, non-adult entertainment are not subject to the restrictions on adult uses, the Amendment also provides that adult theaters, eating and drinking, and other commercial establishments must exclude minors during performances. ZR § 12-10. Adult establishments routinely exclude minors in order to avoid running afoul of the Penal Law's prohibition on the dissemination of indecent material to minors. N.Y. Penal Law, § 235.20 *et seq.*; *see* JA304.

impacts produced by adult uses (JA305). Even before these regulations were adopted, the general regulatory scheme embodied in the Zoning Resolution prohibited new commercial development in the City's residentially-zoned districts (JA305). Under the Amendments, adult uses are also barred from certain districts that are zoned for commercial and manufacturing uses, but, in addition, permit new residential development (ZR, §§ 32-01[a], 42-01[a]). Many of these districts are mapped within residential districts and contain the local retail strips that serve the everyday commercial needs of the surrounding residential neighborhoods (JA305-306, JA28-32).

Adult uses continue to be allowed, subject to certain restrictions in all high-density commercial and virtually all manufacturing districts that are mapped throughout the City and in which a variety of retail, entertainment and other commercial uses are permitted (ZR, §§ 32-01[b], 42-01[b]; JA305-307). In these districts, however, adult establishments must be located at least 500 feet from any school, daycare center or house of worship and at least 500 feet from most zoning districts in which new residential uses are allowed (ZR, §§ 32-01[b], 42-01[b]). In addition, to prevent concentration, in the districts in which adult establishments are permitted, a new adult use must be located at least 500 feet from any other adult use (*id.*, §§ 32-01[c], 42-01[c]); *see* JA307, JA28-32; App. 7a).[3]

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[3] Aside from certain limited exceptions (ZR §§ 32-01[b], [f], 42-01[b], [f]; *see* JA309), the Amendment generally required existing adult establishments that did not conform to the restrictions to come into conformity or terminate within one year of the effective date, *i.e.*, by October 26, 1996 (*id.*, §§ 52-734, 52-77; JA496-97). The Amendment provided that, upon a timely application with the requisite showing by an owner of a non-conforming adult establishment, the City's Board of

(continued...)

While the Amendment affords the people and neighborhoods of New York City a significant degree of protection from the adverse impacts of adult uses, it also provides ample access to adult entertainment and materials for all who desire them (JA309-10). As indicated, adult establishments may operate in a variety of commercial and manufacturing zoning districts that are mapped throughout the City and DCP has calculated that the districts in which adult uses are permitted represent more than 11 percent of the City's total land area, most of which is readily accessible by both car and mass transit (JA309). Indeed, DCP determined that all of the property in Manhattan that is zoned to permit adult uses, and at least 80 percent of the land area in the other boroughs that is so zoned, is within a 10-minute walk from a rapid transit line or a major bus route (JA309).

DCP has also estimated that the Amendment allows for the operation of approximately 500 adult establishments (JA309-10).[4] Under the Amendment, moreover, each such

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[3] (...continued)
Standards and Appeals ("BSA") could allow a non-conforming establishment to be maintained for more than one year from that effective date (ZR § 72-40; JA36-37). However, neither petitioners, nor any other business, chose to utilize this process by making a proper and timely application with payment of appropriate fees. *Stringfellow's v. City of New York*, 91 N.Y.2d 382, 405, 671 N.Y.S.2d 406, 419 (1998).

[4] This estimate takes into account both the limitations on districts where adult uses are permitted and the requirement that an adult establishment be located a minimum distance from certain zoning districts, specified community facilities and other adult establishments (JA309-10). In addition, DCP staff discounted as potential sites certain properties that are unlikely to be developed for any commercial use, including properties occupied with public utilities or oil storage facilities; property designated
(continued...)

establishment may have up to 10,000 square feet of usable floor area (JA310; ZR, §§ 32-01[d], [e], 42-01[d], [e]). Given that approximately 177 adult establishments were operating in the City, and the fact that the vast majority of those establishments occupy far less than the 10,000 square feet permitted, the Amendment permits all of the City's existing adult establishments to continue to operate in the City, either at their current sites or at new locations, and also accommodates a significant expansion of the City's adult use market (JA310).

In sum, the Amendment represents a carefully considered and measured response to the problems associated with adult establishments and is based upon a thorough analysis of the impacts produced by such establishments in New York City and in other municipalities across the country (JA310).

The Action and Defendants' Opposition.

On or about October 10, 1996, almost one year after the Amendment was enacted and mere days before it was to take full effect, petitioners Buzzetti, *et al.*,[5] filed an order to show

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[4] (...continued)
as wetlands by the State Department of Environmental Conservation; publicly-owned vacant property with an area of more than 10,000 square feet; areas under active consideration for a rezoning that would prohibit adult uses; and sites fronting on built roadways (JA309-10).

[5] As set forth in the complaint, plaintiff Adele Buzzetti d/b/a Cozy Cabin is a New York corporation with its principal place of business located at 92-03 Astoria Boulevard, East Elmhurst, New York -- Cozy Cabin is licensed as a cabaret, serving alcohol and featuring live female dancers who perform barechested on stage, and has been operating at the location since 1976 (JA15-16). Plaintiff Vanessa Doe is an adult female over the age of twenty-one years old who performs at the Cozy Cabin (JA16).

cause seeking to preliminarily enjoin the defendants, the City, *et al.*,[6] from enforcing certain provisions of the law (JA6-7, JA22-23). They sought to enjoin those provisions which: 1) define an "adult establishment" as one which "regularly features . . . live performances which are characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities,'" and 2) define "specified anatomical areas" as including the "female breast below a point immediately above the top of the areola" and "specified sexual activities" as including "fondling or other erotic touching of . . . female breast" (JA7).

In the complaint, the first cause of action alleges that by restricting the geographic area where female dancers can perform barechested or in an erotic manner and failing to restrict similarly-situated topless male dancers, the Amendments violate the Equal Protection Clause of the Fourteenth Amendment (JA19-20). The second cause of action alleges that petitioners' rights to free expression under the First and Fourteenth Amendments are violated by burdening women from engaging in, and patrons from receiving, female-oriented erotic expression and not similarly-burdening male-oriented erotic expression (*id.*).

Petitioners submitted an affidavit of Leonore Tiefer, Ph.D., a clinical psychologist specializing in human sexuality and an Associate Professor in the Department of Urology at Montefiore Medical Center (JA242-50). Ms. Tiefer stated that

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[6] The other named City defendants are DCP, the Department of Buildings, the New York City Council, and Rudolph W. Giuliani, Joseph B. Rose, and Gaston Silva, in their official capacities, as the Mayor, the Director of DCP and Chair of the CPC, and the Commissioner of the Department of Buildings, respectively (JA16-17).

widespread commercial opportunities for partially-clothed men to model and dance has constituted a recent development which integrates several trends in sexuality: the increasing marketplace for sex, the demise of double standards for norms of sexual behavior, the commercialization of gay sexuality, and the cult of men's bodies as a source of sexuality (JA242-43). As examples, she cited the development of nightclubs where attractive men dance and strip for women audiences, a Diet Coke television commercial, and various publications (JA245-47). She opined that "it is difficult to see what distinctions can be drawn between the roles of men and women performers in erotic entertainment contexts" (JA250).

Other affidavits were by: petitioner Vanessa Doe, a female topless dancer, who stated that if the law forced most of the places where she worked to close, she would suffer irreparable harm by being severely limited or unable to engage in her chosen form of erotic expression and to earn a living (JA276-78); Carlos Riobo, a male adult, who stated that on September 21, 1996 he visited four clubs in Chelsea, Manhattan, that feature barechested male dancers known as "go-go boys," who all danced in an erotic manner (JA279-81); and Susan Dale Gross, who stated that five years earlier, she visited the former Chippendale's club, which had featured barechested male dancers, and that she was informed that it had reopened as another club featuring male barechested "Chippendale's" dancers on Friday and Saturday evenings (JA282-83).

In their opposing papers and answer, defendants argued that the Amendment is a reasonable and lawful exercise of the City's zoning authority, and that petitioners failed to show a likelihood of success on the merits of their gender-based claims. Defendants relied on the statute, its legislative history, and the underlying planning considerations, as set forth in an

affidavit by Joseph P. Rose, CPC Chairperson and Director of DCP (JA287-311, JA397-400), the DCP Study (JA44-134), and the 1995 CPC Report (JA312-92).

CPC Chairperson Rose recounted the background of the passage of the Amendment and explained that it was carefully drafted to cover only the types of establishments that have been found to produce negative impacts on the communities in which they are located (JA288-311; *ante*, pp. 2-9). Consistent with that purpose, the definitions of "specified sexual activities" and "specified anatomical areas" are tied to activities and physical attributes associated with such establishments and the definitions thus make reference to relevant portions of both the male and female anatomy (JA311).

With regard to establishments featuring barechested performers, CPC Chairperson Rose stressed that the surveys conducted by DCP indicated that the vast majority of topless clubs in the City employ female entertainers exclusively (JA311). Furthermore, according to the studies conducted in New York and other municipalities and the testimony at the numerous hearings that preceded approval of the Amendments, it is those clubs that tend to produce such negative impacts as reduction in the value of nearby properties and impairment of the character of the surrounding community (JA311). Finally, Chairperson Rose stated that, although some establishments in the City offer topless male entertainment, their number appeared to be relatively small and DCP had no evidence that such establishments create the type of negative community impacts that the adult establishments covered by the Amendment tend to produce (JA311).

In addition, the City provided the then-status of the three other pending actions challenging the Amendment facially on numerous grounds (JA284-86).[7] From 1996 to date, those actions were unanimously rejected by every level of the New York state courts, and, most recently, by the Second Circuit.

In relevant part, by judgment entered October 23, 1996, the New York Supreme Court granted the City's cross-motion for summary judgment upholding the Amendment as facially valid and dismissing the three actions. *Stringfellow's v. City of New York*, 171 Misc. 2d 376, 653 N.Y.S.2d 801 (Sup. Ct., N.Y. Co. 1996). The Appellate Division unanimously affirmed the judgment, *Stringfellow's v. City of New York*, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dept. 1997), as did the State's highest court, the New York Court of Appeals. *Stringfellow's v. City of New York*, 91 N.Y.2d 382, 671 N.Y.S.2d 406 (1998).

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[7] In February 1996, two actions were commenced in State Supreme Court: in *Amsterdam Video, Inc. v. City of New York*, the plaintiffs are the owners or operators of over 90 adult establishments, while *Hickerson v. City of New York* was commenced on behalf of several customers (JA284-85). Both complaints alleged that the Amendment deprives them of the right of free expression and other rights protected under the New York Constitution, as well as the rights of free expression guaranteed under the First and Fourteenth Amendments (JA284-85). After defendants removed both actions pursuant to 28 U.S.C. § 1441 and plaintiffs sought a remand, by decision dated June 27, 1996, the District Court remanded all the state constitutional claims, but retained jurisdiction over the federal claims, staying adjudication pending determination of the state claims (JA285; *Hickerson v. City of New York*, 932 F. Supp. 550, 559 (S.D.N.Y. 1996)). In July 1996, the owner of a single adult establishment commenced a third state action, entitled *Stringfellow's v. City of New York* (JA286).

On June 3, 1998, the Second Circuit affirmed a March 6, 1998 judgment of the District Court, which denied a preliminary injunction on the federal claims in the cases, following the New York Court of Appeals' judgment. *See Hickerson v. City of New York*, _ F.3d _, 1998 U.S. App. LEXIS 11593 (2d Cir. June 3, 1998), *aff'g*, _ F. Supp. _, 1998 U.S. Dist. LEXIS 2635 (S.D.N.Y. Mar. 6, 1998), *pet. for rehearing, with en banc suggestion, pending*.

In reply to defendants' opposition, plaintiffs submitted, *inter alia*, a short article by J. Morin under the caption "Male Breast: Overlooked Erogenous Zone," in *Medical Aspects of Human Sexuality*, Vol. 20, No. 3, March 1986, at 86 (JA395-96).

THE DISTRICT COURT'S OPINION

By order entered April 8, 1997, the District Court denied the motion for a preliminary injunction. *Buzzetti v. City of New York*, _F. Supp. _, 1998 U.S. Dist. LEXIS 4383 (S.D.N.Y. Apr. 8, 1997) (App. B, 23a-37a). In a thorough opinion, the Court held that petitioners did not demonstrate a likelihood of success on the merits, a prerequisite to enjoin governmental action in the public interest pursuant to a regulatory scheme (*id.*, 27a-37a)

Relying on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality) ("*Young*") and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) ("*Renton*"), the District Court held that the Amendment, which does not ban adult uses but merely restricts their location, was not viewpoint discriminatory, but rather constituted "a content-neutral time, place, and manner regulation" (App. 28a-31a). Based on the legislative record, it held that the Amendment was designed to

serve a substantial and important governmental interest of eliminating the serious negative secondary effects of adult establishments, such as "preventing crime, maintaining property values, and preserving the quality of the city's neighborhoods" (*id.*, 30a-31a, 36a-37a). The District Court found further that (*id.*, 30a-31a):

> Despite plaintiffs['] contentions, the record does not indicate that the [C]ity was aiming to suppress free expression or to disadvantage women who want to perform barechested, as opposed to similarly situated men. Rather, after careful study[,] the [C]ity decided to regulate the zoning rights of adult establishments in an effort to address the negative impact such establishments have on the surrounding community.

The Court noted that the law's definitions mirror zoning statutes throughout the country which have withstood constitutional scrutiny, citing, as an example, this Court's decision in *Young*, 427 U.S. at 53 (App. 31a).

The District Court rejected the contention that the ordinance is gender-biased in violation of the Equal Protection Clause because it does not apply to such places as Chippendale's where barechested males perform and that the definition of "specified anatomical areas" is impermissibly gender-biased because it does not include the male breast (*id.*, 31a-34a). Preliminarily, "[a]s [even] plaintiffs' expert has noted," American society focuses much more erotic energy on female breasts (*id.*, 33a). The ordinance is aimed at the secondary effects of adult establishments, and, "in our culture the public display of female breasts will have far different secondary effects than the public display of male breasts" (*id.*, 33a). Thus, "Rightly or wrongly, our society continues to

recognize a fundamental difference between the male and female breast (*id.*, 33a)," citing, *inter alia*, *United States v. Biocic*, 932 F.2d 112, 115-16 (4th Cir. 1991) ("[A]natomies that traditionally in this society have been regarded as erogenous zones . . . still include (whether justifiably or not in the eyes of all) the female, but not the male breast").[8]

Finally, citing *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), the District Court recognized the broad discretion afforded legislative bodies in determining which problems to address in enacting regulations (App. 34a-35a). Thus, even if New York City could have enacted broader language or may do so in the future, nonetheless, it was justified in its decision to regulate the zoning of the adult establishments it determined, after thorough review, were the particular cause of the documented secondary effects (*id.*, 35a). The District Court concluded: "The predominate concerns of the City defendants in enacting the Zoning Amendment were with the secondary effects of adult establishments, and not with the content of the expression, nor the gender of the expresser" (*id.*, 36a-37a).

Upon the parties' stipulation (JA451-52), the District Court entered judgment denying declaratory and injunctive relief and dismissing the complaint (JA455-56; App. 9a).

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[8] Furthermore, the District Court (as well as the Second Circuit) noted that, while only the female breast was included, another provision applies only to male genitals in a discernibly turgid state, with such provisions simply recognizing that there are anatomical differences between males and females which in our society elicit different reactions (App. 33a-34a, 13a). The District Court also noted that while petitioners' expert sought to establish that both male and female breasts evoke an erotic response, petitioners did not argue that there are not substantial differences between the male and female breast (*id.*, 34a).

THE SECOND CIRCUIT'S OPINION

In a comprehensive well-reasoned opinion, the Second Circuit unanimously affirmed the District Court's judgment. *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir. 1998), *stay denied*, 1998 U.S. LEXIS 4006 (June 15, 1998) (*see* App. A, 1a-22a).

With respect to the First Amendment claim, the Second Circuit held that the District Court correctly relied on *Young* and *Renton* in rejecting petitioners' arguments, given that, *inter alia*, both those cases involved ordinances substantially similar to the City's, with the definitional terms making reference only to exposed female, but not male, breasts (App. 9a-15a). The Second Circuit held that the City's ordinance comports with that authority and constitutes a content-neutral time, place, and manner regulation, with the ordinance's overall purposes to prevent crime, maintain property values and preserve the quality of life and character of city neighborhoods, which are substantial governmental interests, as in *Renton* and *Young* (*id.*, 13a-14a, 15a). The Second Circuit recognized that the City's reliance on studies from other municipalities was well-placed, but that, in any event, the City went beyond that to conduct its own "detailed study," as well as reviewing previous City studies and testimony at public hearings (*id.*, 14a-15a). Thus, it concluded that, as the District Court found, the City had adequately documented its decision to enact a zoning regulation to help counter the negative secondary effects it believed were caused by adult establishments in the City (*id.*, 14a-15a).

In addition, the Second Circuit held that petitioners failed to show a violation of the Equal Protection Clause (*id.*, 16a-22a). Reviewing the standards governing classifications based on gender articulated by this Court in *United States v.*

Virginia, 518 U.S 515, __, 116 S. Ct. 2264, 2275 (1996) ("*Virginia*"), as well as other leading cases, the Second Circuit emphasized two key principles (App. 16a-17a).

First, while the State must show that the challenged classification serves important governmental interests and that the discriminatory means employed are substantially related to achievement of those objectives, notwithstanding, gender or sex is not a proscribed classification and ". . . Physical differences between men and women . . . are enduring. . .," *(id.*, 16a, citing *Virginia*, 116 S. Ct. at 2276).

Second, the Circuit Court stressed that, as this Court noted in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (plurality opin.) ("*Michael M.*"):

> "because the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require that things which are different in fact . . . to be treated in law as though they were the same, this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."

(App. 17a, quoting *Michael M.*, 450 U.S. at 469 (internal quotation marks and citations omitted)).

Applying these principles to the Zoning Amendment, the Second Circuit concluded that, for the reasons stated in its First Amendment discussion, the City's objectives behind the ordinance are important and that the regulation of female, but not male, topless dancing in the context of the City's overall regulation of sexually explicit commercial establishments, is

substantially related to the achievement of the City's objectives (App. 18a). Thus, the gender-based classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in this case (*id.*, 22a, citations and quotation marks omitted).

Noting that the relevant inquiry is whether the line chosen by the legislature is within constitutional limitations, the Court reviewed the evidence submitted by the City, including CPC Chairperson Rose's uncontradicted affidavit that the City had no evidence that male topless clubs created deleterious negative community impacts (App. 18a-19a). The Court concluded: "New York City carefully studied the contours of the problem it was seeking to address and legislated in accordance with its findings" (*id.*, 19a).

Moreover, and as the District Court pointed out, "numerous courts have recognized that the societal impacts associated with female toplessness are legitimate bases for regulation" (*id.*, 19a-20a, citing, *inter alia*, *United States v. Biocic*, *supra*; *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1278-80 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *Tolbert v. City of Memphis*, 568 F. Supp. 1285, 1290 (W.D. Tenn. 1983)). The Second Circuit noted that the male chest is routinely exposed on beaches, in public sporting events and at the ballet, while, in contrast, public exposure of the female breast is rare in our society, and almost invariably conveys sexual overtones (App. 20a).

As a final note, the Second Circuit aptly pointed out that, " . . . given the City's findings, regulating both male and female topless entertainment might have burdened more expressive activity than necessary, thus creating potential First Amendment problems" (*id.*, 20a-21a, *comparing Schad v.*

Borough of Mount Ephraim, 452 U.S. 61, 73, n.15 (1981); *Erznoznik v. Jacksonville*, 422 U.S. 205, 213 (1975) *with Renton*, 475 U.S. at 52).

By order dated May 14, 1998, the Second Circuit denied petitioners' motion for a recall of the mandate and a stay of enforcement. Following Justice Ginsburg's June 1, 1998 order denying petitioners' application for a stay of enforcement, by order dated June 15, 1998, this Court entered an order which stated that petitioners' subsequent ". . . application for [a] stay addressed to Justice Souter and referred to the Court is denied." *Buzzetti v. City of New York*, 1998 U.S. LEXIS 4006 (U.S. June 15, 1998).

REASONS FOR DENYING THE WRIT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S DECISION IS CORRECT AND IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER CIRCUIT COURT. THE CITY'S ADULT USE ZONING AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT OR THE EQUAL PROTECTION CLAUSE.

Upon review of the Second Circuit Court of Appeals' opinion (App. A, 1a-22a), petitioner does not raise any legal issue deserving this Court's review. Accordingly, the petition for a writ of certiorari should be denied.

(1)

Petitioners' argument that the Second Circuit's First Amendment ruling conflicts with numerous holdings of this

Court, and of the First, Third and Ninth Circuits (Pet. Pt. II, at 12-17) is erroneous. Quite simply, the directly controlling precedent in the instant case is in *Renton* and *Young*. As in those cases, as both courts below held, the City met its burden to show that the Zoning Amendment's legislative purpose was to combat the well-documented and universally well-recognized deleterious negative secondary effects of certain adult establishments. Indeed, as the Circuit Court carefully laid out in its opinion, even assuming petitioners have accurately characterized female topless dancing as conveying, for First Amendment purposes, the "viewpoint" of "female eroticism," the record shows that the City's legislature was not aiming to suppress such free expression, but: "Rather, after careful study the city decided to regulate the zoning rights of adult establishments in an effort to address the negative impact such establishments have on the community" (App. 12a-13a; *see also* App. 10a, citing, *inter alia*, *Young*, *supra*, and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opin.)).

Petitioners' selective presentation of quotations from inapposite cases and their brash argument that the *Renton* "secondary effects" rationale "should not extend" to this case (Pet. at 13-15) is simply overreaching and provides no basis for this Court to grant the writ.

Furthermore, petitioners' heavy reliance on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (Pet. at 16), is misplaced. Therein, this Court found that the City of Cincinnati's differential treatment of commercial and noncommercial speakers placing newsracks on the streets had "no relation *whatsoever*" to its legitimate underlying purpose to limit the number of newsracks. *Id.* at 424 (italics in original). In so doing, as petitioners themselves acknowledge

(Pet. at 16), this Court favorably contrasted the speech at issue therein with *Renton*, where there were substantial negative secondary effects attributable to the speech at issue.

So too, the claimed conflict with other Circuits is non-existent. For example, the decision in *AIDS Action Committee of Mass, Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1 (1st Cir. 1994) (Pet. at 15), is inapposite because it involved a finding that there was differentiation among speakers based upon their message with respect to allowing commercial advertising for public service announcements on City subway and trolley cars.

In sum, as in *Young* and *Renton*, no viewpoint discrimination or content bias is present here. Petitioners' persistence in ignoring the ample precedent regarding the validity of adult use zoning ordinances to help control the serious secondary effects of adult uses is thus totally misguided. *See Renton, supra; see also Hang On, Inc., v. City of Arlington*, 65 F.3d 1248, 1257 (5th Cir. 1995).[9]

Moreover, notwithstanding their protestations (Pet. at 16-17) and as the Courts below recognized (App. 18a-19a), petitioners notably presented no evidence to controvert defendants' affidavits reflecting the content-neutrality of the

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[9] In rejecting a similar challenge to the instant one, the Fifth Circuit also distinguished *Williams v. City of Fort Worth*, 782 S.W.2d 290, 296 (Tex. App. Fort Worth 1989), a state case mistakenly relied on by petitioners (Pet. at 6, 15). Not only was that case decided under the Texas Equal Rights Amendment, which raises gender to a suspect classification, but also the corresponding evidentiary burdens imposed on the City by the Texas state court related to that high standard and the state court's finding that the zoning definition was not content neutral under Texas law, a finding clearly at odds with the federal standards under *Renton*, *Young* and progeny.

regulations and the legitimacy of the City's stated interests in addressing the negative secondary effects of adult establishments (JA445). *See, e.g., City of Tucson v. Wolfe*, 917 P.2d 706, 708-709 (Ariz. 1995), quoting *Craig v. Boren*, 429 U.S. 190, 204 (1976).[10]

Finally, petitioners' argument not only distorts the Second Circuit's and District Court's opinions, but also appears to raise factual or evidentiary issues which this Court does not sit to review. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"). Furthermore, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). These controlling principles thus also warrant denial of this petition.

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[10] In *City of Tucson v. Wolfe*, the Court found that an ordinance requiring covering of portions of the female breast was based not only on differences in physical characteristics between men and women, but also was rooted in societal norms and perceptions associated with those differences. *Id.* at 708-709. Among the evidence submitted in support of the plaintiffs' unsuccessful argument was the same short article submitted by petitioners here, "Male Breast: Overlooked Erogenous Zone," contained in *Medical Aspects of Human Sexuality*, Vol. 20, No. 3, March 1986, at 86 (*see ante*, p. 14; JA395-96). *City of Tucson*, 917 P.2d at 708-709 n.1.

With respect to their Equal Protection argument, petitioners wrongly state that the Second Circuit's ruling conflicts with numerous decisions of this Court (Pet., Pt. I, at 5-12). However, review of the Circuit's opinion and its examination of the precedent from this Court, including *Virginia*, *supra*, indisputably show that there is no such conflict (*see* discussion, *ante*, pp. 17-19; App. 16a-22a). As stated in *Michael M.*, *supra*, a gender classification based on clear differences between the sexes is "not invidious, but rather reflects the fact that the sexes are not similarly situated in certain circumstances." *Id.*, 450 U.S. at 469. Tellingly, petitioners largely rely on the dissenting opinion in *Michael M.* in making their argument (*see* Pet. at 6, 11)

Similarly, petitioners' reliance on Justice Ginsburg's dissenting opinion in *Miller v. Albright*, __U.S.__, 118 S. Ct. 1428 (1998), a case decided after the Circuit Court's opinion herein, to support their argument (Pet. at 10) is misplaced. Most importantly, aside from the distinct context in which that case arose, there is an ample record here supporting the legislative decision to address the secondary effects of female topless dancing. As discussed above, there is no indication that the legislative classification relied on gender stereotyping, but rather rested on the numerous studies throughout the country as to the negative secondary effects associated with topless female adult establishments.

Petitioners' final arguments as to purported confusion in the legal standards for assessing gender discrimination claims and their desire to change the law (Pet. at 10-12) are based on speculation and wishful thinking. They are at odds with a wealth of case law, including from this Court, as discussed by

both the District Court (App. 31a-34a) and by the Second Circuit Court of Appeals in its thorough opinion (*id.*, 16a-22a).

(3)

For all the above reasons, the City's adult use Zoning Amendment does not violate the First Amendment or the Equal Protection Clause.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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